TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 75

GWIN, WHITE & PRINCE, INC., APPELLANT,

vs.

HAROLD H. HENNEFORD, THOMAS S. HEDGES AND T. M. JENNER, CONSTITUTING THE STATE OF WASHINGTON TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED MAY 31, 1938.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 20, 1938.

—8018

[fol. 1] [File endorsement omitted]

IN SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 16434

GWIN, WHITE & PRINCE, INC., a Corporation, Plaintiff,

vs.

HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Constituting the State of Washington Tax Commission, Defendants

COMPLAINT—Filed February 3, 1937

Comes now the plaintiff, and for cause of action against the defendant alleges as follows, to-wit:

I

That the plaintiff is a corporation organized under the laws of the State of Washington, having its place of business in Seattle, King County, Washington, and that it has paid its last due annual license fee as required by law and is duly qualified to do business within the State of Washington, and to sue and be sued in the courts thereof.

II

That the defendants, Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, constitute the Tax Commission of the State of Washington, and as such have in charge the enforcement of the collection of taxes accruing to the State of Washington under the so-called Business and Occupation Tax as enacted by the Legislature of the State of Washington and approved by the Governor March 25, 1935, as set forth in Title II of Chapter 180 of the 1935 Session Laws of the State of Washington.

III

That the plaintiff, acting solely as agent for various grow-
[fol. 2] ers and grower organizations in the States of Washington and Oregon is engaged in the business of marketing apples and pears produced in the said States of Washington and Oregon and in making deliveries of fruit so sold, col-

lecting the sales price and remitting the net balance thereof to said growers and grower organizations. That plaintiff has taken out no license as a commission merchant under the laws of the State of Washington.

IV

That all of the sales of fruit made by the plaintiff are made in the course of interstate and foreign commerce save and except an occasional sale of a small quantity of fruit sometimes made within the State of Washington. That with the foregoing insignificant exception all of the fruit sold by the plaintiff is shipped and delivered outside of the state of Washington to purchasers who are non-residents of the State of Washington, said fruit going to all parts of the United States and a very large portion thereof to foreign countries.

V

That as a part of plaintiff's business it has sales representatives in very many points outside of the State of Washington, who, on behalf of the plaintiff, negotiate said sales and on approval of the plaintiff of the same execute in said points outside of the State of Washington and on behalf of the plaintiff written contracts of sale. That also as a part of its business plaintiff during the fruit season, which extends over a large portion of the calendar year, sends to its aforesaid representatives outside of the State of Washington daily bulletins listing cars of fruit, some of which are at the time either stored outside the State of Washington or are already moving in cars in interstate commerce. That in conducting its aforesaid business and in making said sales, all of which, both as to origin and completion, are interstate or foreign commerce, plaintiff expends very large sums of money in telephone, telegraph and cable communications, all in interstate and foreign commerce. That [fol. 3] as a further part of its business, plaintiff handles the bills of lading on all shipments made in compliance with the contracts of sale entered into in foreign and extra-state territory, most of said shipments being consigned to the plaintiff at extra-state points, and that through its foreign and extra-state representatives plaintiff attends to the delivery of said shipments and collects the proceeds therefrom, which are thereafter forwarded to the plaintiff

at Seattle, Washington, all in the course of interstate and foreign commerce.

VI

That approximately one-quarter of all the fruit sold and handled by the plaintiff, both as to quantity and value, is grown in and shipped from the State of Oregon, none of which ever enters the State of Washington.

VII

That the business of the plaintiff, as hereinbefore set forth, constitutes all its business, and that the same, both as to the inception and completion of said sales and the delivery of said fruit, consists of interstate and foreign commerce, and that the plaintiff's income is wholly derived from such interstate and foreign commerce.

VIII

That the said defendants constituting and acting as the Tax Commission of the State of Washington have ruled and assert that plaintiffs come within the purview of Title II of Chapter 180 of the Laws of 1935 aforesaid, and are liable for the payment of an occupation tax upon the business done by them. That the defendants, as such Tax Commission, are demanding of the plaintiff that it pay to said Tax Commission a business or occupation tax upon the plaintiff's gross revenue derived from the business done by the plaintiff and are threatening the enforcement of the collection thereof, and will subject the plaintiff to penalties [fol. 4] provided in said act in case of its failure to so pay. That unless the defendants are restrained from enforcing said business tax against the plaintiff, they will interfere with plaintiff's business, will subject the plaintiff to prosecution under the provisions of said act, and do the plaintiff irreparable harm and injury.

IX

That the enforcement of the collection of said business tax by the defendants against the plaintiff is in violation of the Commerce Clause of the Constitution of the United States and constitutes an illegal interference with interstate and foreign commerce in contravention of the laws of the United States, and constitute an import or duty on

exports in violation of Sec. 10 Act I of the Constitution of the United States.

X

That the plaintiff has no plain, speedy or adequate remedy at law and that its only remedy is in a court of equity by the issuance of a restraining order, restraining and enjoining the defendants and all persons acting by, through or under them from enforcing the collection of the tax which they are seeking to impose upon the plaintiff, and that it is necessary that the defendants be so enjoined and restrained to prevent said loss and damage as aforesaid.

Wherefore, plaintiff prays as follows:

(1) For judgment and decree of this court perpetually enjoining and restraining the defendants and all persons acting by, through or under them from enforcing or attempting to enforce the provisions of said Title II of Chapter 180 of the Session Laws of 1935 against the plaintiff, and from collecting or attempting to collect a business or occupation tax from the plaintiff, and from in any wise interfering with plaintiff's business, or taking any action against the plaintiff for failure to comply with the provisions of said act.

[fol. 5] (2) That it be accorded such other relief as to the court may seem meet and equitable.

Bayley & Croson, Attorneys for Plaintiff.

Duly sworn to by A. A. Prince. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 6] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

STIPULATION AS TO DECISION, ETC.—Filed January 14, 1937

It is stipulated by and between counsel for respective parties to this action that the court may decide this case on the merits on defendants' demurrer together with additional facts herein stipulated.

It is further stipulated that plaintiff, Gwin, White & Prince, Inc., transacts its entire Washington State business under a written contract with the Wenatchee-Okanogan Cooperative Federation which is an organization representing approximately twelve cooperative growers' organizations in the state of Washington, and that a full, true and correct copy of said contract is hereto attached, marked Exhibit A.

Witness our hands this 6th day of January, 1937.

G. W. Hamilton, Attorney General; E. P. Donnelly, Assistant Attorney General, Attorneys for Defendants. Bayley & Croson, Attorneys for Plaintiff.

[fol. 7] (Copy)

EXHIBIT "A" TO STIPULATION

Contract

This Agreement, made and entered into in duplicate on this — day of ——, 1933, by and between Wenatchee-Okanogan Cooperative Federation, a corporation of Wenatchee, Washington (hereinafter for brevity called Federation) as party of the first part, acting for its members, and Gwin, White & Prince, Inc., a corporation of Seattle, Washington (and hereinafter for brevity called Agency), as party of the second part:

Witnesseth:

In consideration of the Mutual Agreements herein contained, Federation hereby appoints Agency its exclusive agent to sell and collect the proceeds from sales of all commercially packed apples and pears which shall come into possession of or control of Federation as agent for its members, during the continuance of this contract.

Term of Existence.—This contract shall be in full force and effect for the term of one year from and after the date hereof and shall automatically continue for succeeding terms of one year each, unless and until, on or before March first of any year term, either party hereto shall notify the other party, in writing, of its desire to terminate this contract at the end of the then one year period, and such notice shall constitute a termination at the end of said period. However, such termination shall not become effective until

all indebtedness which may then be owing by Federation or any of its members to Agency shall have been paid. In the event that Agency shall be under any contingent liabilities with respect to Federation or any of its members when such notice is served, termination shall be delayed until Federation shall furnish an indemnity bond in amount and with surety satisfactory to Agency, and the contract shall then terminate.

It is specifically understood and agreed by each of the parties hereto as follows:

Federation Agrees:

1. To harvest, clean and pack such products at the proper stage of maturity and in first class manner and shipping condition, and to protect them from damage by exposure to sun, wind or frost; to establish grading rules which shall be mutually satisfactory to Federation and Agency and to cause all products under its control to be graded strictly in accordance therewith, and for the purpose of carrying out the foregoing to maintain an efficient system of inspection.

2. Thoroughly to inspect all equipment tendered by common carriers for loading; to accept only such equipment as is in proper physical condition and of capacity safely to permit loading up to the minimum prescribed in carrier's tariff; at such times as directed by Agency to deliver products free on board cars at shipping stations after inspection, approval and acceptance of such equipment to line cars with paper, and equip them with temporary or permanent false floors if required by carriers, and to conform to any other requirements of common carriers.

[fol. 8] 3. To load cars in a careful manner, stripping and bracing each load with good sound lumber, in accordance with the official standards of the carriers, or in accordance with standard loading specifications of Agency; to ship all cars to points and consignees designated by said Agency. Federation hereby delegates to Agency the right of diversion in transit.

4. To guarantee to the initial carriers all freight and other transportation charges, and, if required, to furnish initial carriers with bond or other surety satisfactory to the carrier; also, if required by the carrier, to prepay transportation charges. To guarantee and be responsible

for transportation charges on unused ocean steamship space where engagement of said space has been authorized or confirmed through Agency by Federation or any of its members.

5. To deliver to Agency immediately after shipment of each car billed thereto or pursuant to its instructions, the original Bill of Lading and one carbon copy thereof, and a complete manifest in quadruplicate; also a comprehensive signed inspection report, all on Agency's standard forms. Also to advise Agency by wire, if required by it, of shipment of all cars and the contents thereof.

6. To furnish Agency from time to time with such general and detailed estimates of prospective crops and shipments as Agency may require and to furnish weekly (or oftener if requested), a detailed inventory of the products on hand at each shipping point, or other wise available for sale.

7. Promptly to report to Agency by wire, all offers for cash or otherwise, which may be received by said Federation or any of its members, and further to refer all such offers to Agency for negotiation, consummation, invoice and collection.

8. To assume the expense of any terminal or transit inspections made by United States Department of Agriculture's Inspection Service at the direction of Agency in the protection of Federation's interests where contents of car arrive damaged, where alleged to be not up to grade or pack, where necessary at ports of embarkation to complete the documentation of export sales, or where otherwise necessary or advisable in the judgment of the Agency.

Agency Agrees:

1. To sell said products free on board cars at shipping station, in transit or delivered, but so far as possible and advisable on the basis of free on board cars at shipping station.

2. To effect the widest possible distribution of the products so far as advisable and consistent with securing the highest net returns and to that end vigorously and intensively to cultivate and develop domestic and foreign markets.

3. To use its best efforts to the end that the route between producer and consumer is shortened by the elimination of waste, avoidance of unnecessary middlemen, and the education of the legitimate wholesale and retail trade, thereby increasing the returns to the producer.

4. To keep Federation and its members duly informed of market conditions and changes therein, from time to time.

[fol. 9] 5. At all times during business hours to permit any authorized officer or representative of Federation or any of its members to inspect any of its books, records and accounts pertaining to shipments, moneys or any other items in which Federation or any of its members has legitimate interest.

6. When shipments are properly billed to Agency or its order, sales made by Agency, invoiced by it, and in all respects handled throughout by Agency and actually delivered to purchaser, Agency shall be responsible to Federation for the collection and payment to the Federation of the sales proceeds thereof, Provided, however, that Agency's responsibility hereunder shall not be taken to include allowances made to overcome rejections or to adjust reasonable claims, nor shall Agency's responsibility include failure or default of any bank or banker connected with or participating in the handling, collection or remittance of funds belonging to the Federation or any of its members.

7. Through its Traffic Department to assist Federation in all matters pertaining to transportation services; specifying correct routings and cooperating with the carriers in facilitating the prompt and safe transit of cars through to final destinations.

8. To cooperate with Federation and other representatives of the industry, in all reasonable efforts for the creation and maintenance of equitable transportation rates, and improvement of transportation services.

9. To provide the facilities of its Claim Department in the prosecution of claims for overcharge or loss or damage resulting from negligence or error on the part of any participating common carrier, as hereinafter provided.

10. So far as practicable, equitably and impartially to prorate to the several members of the Federation all "open orders" (orders in which the buyers do not specifically

nominate labels) in accordance with the detailed estamates and inventories furnished Agency by Federation and its members.

11. That Agency will not engage in any speculative business in fruits either directly or indirectly. Failure to strictly comply with the terms of this paragraph, with or without the breach of any other part of this contract, will be sufficient grounds for cancellation of this contract.

It is further mutually understood and agreed by both parties hereto as follows,

1. The general sales policy in the disposition of fruit covered by this contract shall be based on sound principles of gradual, seasonal, orderly marketing, with due regard to the timely liquidation of bank loans and other obligations as early as may be consistent with the security of maximum market values.

2. The Federation and its members shall have the exclusive right and authority, consistent with (1) above, (except as hereinafter provided) to fix the price at which its or their products may be sold by the Agency, but in event the price so determined shall be higher than the best market price reasonably obtainable, Agency shall not be held responsible for failure to negotiate sales at such prices. Failure by the Federation or its members to determine specific prices and so advise Agency at time of shipment (or prior to sale of tramp car or cars in storage at other than shipping points) will be the authority for Agency to sell or dis- [fol. 10] pose thereof at the best prices and terms reasonably obtainable.

Provided, However, that in recognition of the fact that Agency is under certain contractual fiduciary obligations to the Wenoka Credit Corporation and its bankers and assigns, in the event of conflict of judgment as between Federation (or any of its members) and the Agency with respect to the wisdom of any certain proposed sale or sales, the judgment of Agency shall prevail, so long as Federation or its members concerned in any such transaction shall be indebted to the Wenoka Credit Corporation, its bankers or assigns. When the Federation or the member concerned shall have discharged all indebtedness with respect to the collection and remittance of which the Agency is legally or morally responsible, then and in that event the right and

authority to pass upon sales shall vest exclusively in Federation or its members.

3. Upon consummation of sales and receipts of proceeds thereof, the latter shall be deposited by Agency in a separate fund, entitled Gwin, White & Prince, Inc., Trustee.

Agency shall, promptly on receipt of sales proceeds, withdraw from the trustees fund all charges due it from Federation for services rendered and expenses incurred in Federation's behalf, and also all moneys owing by Federation or any of its members on notes or advances, to the Wenoka Credit Corporation or its assigns, and pay the same to the person entitled thereto.

Provided however, that proceeds from sales of fruit shipped by any particular member of Federation shall only be applied toward the retirement of the indebtedness of that member.

Agency shall disburse the balance of the net proceeds as promptly as possible to Federation, or its order.

4. Unless otherwise expressly authorized or directed by the Federation all sales shall be made on the current market. In the event of products being placed in distant cold-storage, pursuant to instructions of, or with the consent of Federation (and by "distant" is meant any storage point outside this immediate district) Federation authorizes Agency to deduct from sales proceeds the expenses actually connected with storage and inspection.

5. When any sale is made by Agency and confirmed by Federation or a member, Federation and member agree to hold Agency harmless against all expense or loss suffered by Agency, either by reason of failure to deliver the order so confirmed, to live up to the specifications of order, or otherwise to effect good delivery, thus causing rejections, adjustments, allowances, reclamations or necessitating resales.

6. In the event of rejection of shipments or other emergency which, in the judgment of Agency may demand immediate action on its part in order properly to protect the interest of Federation, Agency is hereby authorized to take such immediate action as it may deem necessary in the premises, and to notify Federation of the action taken.

7. Agency is hereby authorized and directed by Federation to prosecute all claims against common carriers, pub-

lic utilities and others, Agency in these circumstances acting as agent of Federation, which hereby agreed to pay therefor the charges hereinafter specified.

[fol. 11] 8. That Agency will endeavor to audit carriers' expense bills in all cases where legal liability may attach to Federation and if proper legal transportation charges have not been made, or reasonable doubt exists that there is an undercharge the known or estimated amount thereof may be withheld by Agency from any remittance due Federation until investigation discloses the fact and amount of such omission or undercharge, whereupon Agency shall refund any amount unnecessarily withheld to the person entitled thereto.

9. It is contemplated that all manifests, inspection reports, crop estimates and other date required by Agency or by the Wenoka Credit Corporation or its assigns shall be made out on standard forms approved by Agency and the Wenoka Credit Corporation.

10. The Agency shall bear the expense of all Telegraph and Telephone messages sent by either party hereto to the other.

11. Inasmuch as the remedy at law would be inadequate, and as it is now, and ever will be impracticable and extremely difficult to determine the actual damage resulting to Agency should Federation violate the exclusive selling authority hereby granted to Agency by disposing of its products, or any part thereof, in a manner not specifically provided in this agreement, said Federation hereby agrees to pay to Agency for all products delivered, sold, consigned, or marketed by or for its otherwise than through Agency as herein provided for, as liquidated damages for such breach of contract, an amount equal to the fees Agency would have received had the sales been made by it, said amount to be immediately due and payable upon completion of sale, but said damages shall not be in derogation of any other rights given Agency under this contract.

The Covenants and Agreements in this contract set forth shall be binding not only upon the parties hereto, but also upon their respective personal representatives, successors, or assigns, and upon all members of Federation.

In Consideration of the services to be rendered by Agency according to the provisions above set forth, Federation shall pay to Agency, and the latter is authorized to deduct from the proceeds of sales made, the following compensation, viz.:

Apples in standard boxes, eight cents ($.08) per box.
Pears " " " ten cents ($.10) " "

Provided Further, That on all cars sold to which attach brokerage, diversion demurrage, icing, storage or other charges not properly payable by the purchaser, or that in the event of cars being broken up and sold in less-carload parcels at destination; cars being exported or cars sold delivered, all transportation, icing, selling, auction, dock, carting, seaboard forwarding and other actual out-of-pocket expenses shall be first deducted from the proceeds of any such sale and no part of such expense shall be borne by Agency out of its service revenues.

Claim Collection.—Prosecution of claims against common carriers or public utilities shall be at Agency's expense, free of charge to Federation. Provided, however, that in the event lawsuit or other extraordinary procedure is necessary to effect collection of particular claims, the actual cost thereof shall be a charge against the proceeds and be deducted therefrom. And provided further that no lawsuit or other extraordinary procedure shall be undertaken by Agency unless or until Federation shall first give its consent. In the event any such authorized litigation be unsuccessful, Federation will pay the actual cost thereof.

[fol. 12] In Witness Whereof, said parties have executed this instrument in duplicate the day and year first above written.

Wenatchee-Okanogan Cooperative Federation, by —— ——, President.

Attest: —— ——, Secretary.

Gwin, White & Prince, Inc., by —— ——, President.

Attest: —— ——, Secretary.

[fol. 13] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

DEMURRER—Filed January 14, 1937

Come now the above entitled defendants and demur to plaintiff's complaint on the ground and for the reason:

I

That the same does not contain facts sufficient to constitute a cause of action.

G. W. Hamilton, Attorney General; E. P. Donnelly, Assistant Attorney General, Attorneys for Defendants.

Copy received 1-12-37. Bayley & Croson.

[File endorsement omitted.]

[fol. 14] IN SUPERIOR COURT OF THURSTON COUNTY

No. 16434

GWIN, WHITE & PRINCE, INC., a Corporation, Plaintiff,

vs.

HAROLD HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Constituting the State Tax Commission, Defendants

MEMO OPINION—Filed April 19, 1937

I have very carefully considered the authorities cited by counsel and still feel that the question is a very close one. I am of the opinion that the defendants' demurrer should be sustained, not upon the ground that the plaintiff is not engaged in interstate commerce, but upon the ground that it is a domestic corporation and that the tax levied is not a tax upon interstate commerce but upon the privilege of the domestic corporation to exist in the state.

(Signed) D. F. Wright, Judge.

[File endorsement omitted.]

[fol. 15] In Superior Court of Thurston County

[Title omitted]

Order Sustaining Demurrer—Filed May 26, 1937

This matter coming on regularly for hearing on defendants' demurrer to plaintiff's complaint, the plaintiff appearing by Messrs. Bayley and Croson, their counsel, and defendants appearing by the Hon. G. W. Hamilton, Attorney General of the State of Washington, and Hon. E. P. Donnelly, Assistant Attorney General, and the court having listened to the argument of counsel and having considered the written briefs filed by counsel and having on the 20th day of April, 1937, handed down its memorandum opinion to the effect that defendants' demurrer should be sustained, Now, Therefore,

It is by the Court Ordered, Adjudged and Decreed that defendants' demurrer to plaintiff's complaint be and it hereby is sustained, to all of which the plaintiff excepts and its exception is hereby allowed.

Done in Open Court this 26th day of May, 1937.

D. F. Wright, Judge.

[File endorsement omitted.]

[fols. 16-17] [File endorsement omitted]

In Superior Court of Thurston County

No. 16434

Gwin, White & Prince, Inc., a Corporation, Plaintiff,

vs.

Harold Henneford, Thomas S. Hedges and T. M. Jenner, Constituting the State Tax Commission, Defendants

Judgment—Filed May 26, 1937

This matter coming on regularly for hearing on defendants' demurrer to plaintiff's complaint, the plaintiff appearing by Messrs. Bayley & Croson, their counsel, and defendants appearing by the Honorable G. W. Hamilton,

Attorney General of the State of Washington, and Honorable E. P. Donnelly, Assistant Attorney General, and the court having listened to the argument of counsel and having considered the written briefs filed by counsel and the stipulation between the parties that the state makes no claim to the tax upon the Oregon business of plaintiffs, even though it clears through plaintiff's Seattle office and the court having considered the regular contract under which plaintiff does business, which, by stipulation of the parties was to be considered by the court as an agreed statement of fact, and plaintiff having elected not to amend its complaint, but to stand thereon as supplemented by said agreed statement of fact, and the court being of the opinion that the business of plaintiff, originating in the State of Washington, is taxable, Now, Therefore,

It is by the Court Ordered, Adjudged and Decreed that the prayer of plaintiff's complaint be and the same hereby is denied and that this action be and it hereby is dismissed with statutory costs to be taxed. To all of which the plaintiff excepts and its exception is hereby allowed.

Done in open court this 26th day of May, 1937.

D. F. Wright, Judge.

[fol. 18] In Superior Court of Thurston County

[Title omitted]

Notice of Appeal—Filed June 10, 1937

To Harold Henneford, Thomas S. Hedges and T. M. Jenner, Constituting the State Tax Commission, and G. W. Hamilton, Attorney General:

You, and each of you, are hereby notified that the plaintiff, Gwin, White & Prince, Inc., a corporation, feeling itself aggrieved, does hereby appeal to the Supreme Court of the State of Washington from that certain judgment made and entered herein by the Court on May 26, 1937, wherein and whereby the prayer of the plaintiff's complaint was denied and the action dismissed with costs of suit.

Dated at Seattle, Washington, this 9th day of June, 1937.

Bayley & Croson, 900-906 Insurance Building, Seattle, Washington, Attorneys for Plaintiff.

Copy of the foregoing Notice of Appeal received and service admitted this 10th day of June, 1937.

E. P. Donnelly, Asst. Atty. Genl., Attorneys for Defendants.

[fol. 19] [File endorsement omitted.]

[fol. 20] In Supreme Court of Washington

Assignments of Error—Filed August 13, 1937

(Part of Page 10 and Part of Page 11, Brief of Appellant)

1. The trial court erred in sustaining the demurrer of the respondents to appellant's complaint.

2. The trial court erred in denying the prayer of the appellant's complaint and dismissing said complaint.

3. The trial court erred in holding that the imposition and collection from the appellant of the Business and Occupation Tax does not impose a burden upon interstate and foreign commerce in violation of the Commerce Clause of the Constitution of the United States, and that the imposition of said tax upon appellant does not violate Article 1, Section 9, Clause 5, and Article 1, Section 10, Clause 2 of the Constitution of the United States as being an impost or duty on exports.

4. The trial court erred in failing to overrule the respondents' demurrer and in failing to find for the appellant on its complaint.

[File endorsement omitted.]

[fol. 21] IN SUPREME COURT OF WASHINGTON

No. 26793

GWIN, WHITE & PRINCE, INC., a Corporation, Appellant,

vs.

HAROLD H. HENNEFORD et al., Constituting the Tax Commission of the State of Washington, Respondents.

ORDER SETTING CAUSE FOR REHEARING EN BANC—Filed November 29, 1937

It is Ordered that the above-entitled cause be assigned for rehearing en Banc during the first week of January, 1938.

Dated this 29th day of November, 1937.

By the Court.

Wm. J. Steinert, Chief Justice.

[File endorsement omitted.]

[fol. 22] IN SUPREME COURT OF WASHINGTON, EN BANC

No. 26793

GWIN, WHITE & PRINCE, INC., a Corporation, Appellant,

v.

HAROLD H. HENNEFORD, THOMAS S. HEDGES, and T. M. JENNER, Constituting the State of Washington Tax Commission, Respondents.

OPINION—Filed February 9, 1938

This action was instituted by Gwin, White & Prince, Inc., a domestic corporation of Seattle, to restrain the state tax commission from enforcing against the plaintiff the provisions of title II, ch. 180, L. 1935, for collection of a business or occupation tax from all persons engaged in business activities in the State of Washington. The appeal is from the judgment of dismissal rendered after a demurrer had been sustained to the complaint.

The facts presented by the allegations of the complaint, which are admitted by the demurrer to be true, and the stipulation of the parties, are in substance as follows: The appellant, acting solely as agent of various growers and grower organizations in Washington and Oregon, is engaged in the business of marketing apples and pears produced in Washington and Oregon and in making deliveries of fruit so sold. The growers and grower organizations have the exclusive authority to fix the price at which their or its products may be sold by appellant who is required to collect the sales price of fruits sold and to deposit the [fol. 23] proceeds of the sales in a separate fund entitled "Gwin, White & Prince, Inc., Trustee." From this fund appellant deducts its charges as fixed by the contract of the appellant with the growers and pays the balance to the contracting organization. Appellant transacts its entire business originating in the state of Washington under a written contract with the Wenatchee-Okanogan Co-Operative Federation made up of approximately twelve co-operative associations in this state. Under the terms of that contract appellant is the exclusive agent of the federation to sell and collect the proceeds from sales of all commercially packed apples and pears which come into the possession or control of the federation as agent for its members. By that contract the appellant is obligated to sell the fruit and to obtain the widest possible distribution of same, to inform the federation and its members as to marketing conditions, to be responsible for collections on all sales made by appellant on all shipments where the bill of lading runs to appellant or its order, to handle all traffic matters pertaining to shipments and to attend to the collection of claims against carriers or others. The compensation to be paid to appellant for its services under the contract is eight cents a box for apples and ten cents a box for pears. Except for an occasional sale of a small amount of fruit made within this state, all of the fruit sold is shipped to points outside the state of Washington; that is, the fruit is shipped to other states and to foreign countries. In the conduct of its business as agent for the fruit growers, the appellant maintains sales repre- [fol. 24] sentatives in many points outside of the state of Washington, both within the United States and in Europe, whose duty is to negotiate sales, and who execute written contracts of sale in appellant's name and on its behalf at

their respective places of business outside of the state of Washington.

As a part of its business, the appellant sends to its representatives outside of this state daily bulletins listing cars of fruit which are for sale. The appellant gives shipping directions to the respective growers and sellers and handles all of the bills of lading on shipments, most of which are consigned to appellant at points outside of this state. Upon arrival of the fruit at its destination, appellant attends to the delivery of shipments and collection of the proceeds therefrom.

Upon the ground that it is acting only as an agent for the fruit growers and that it is engaged solely in interstate commerce, appellant has never taken out a license under the commission merchants law of this state. The state tax commission's demand for payment of a business or occupation tax upon the appellant's gross revenue (commission of eight cents a box for apples and ten cents a box for pears) derived from the business done by the appellant under its contract as agent of the fruit growers was rejected. That is, the state tax commission's claim of a tax liability on the total commissions appellant receives from the growers for Washington-grown fruit sold and shipped to points within and without this state was denied. Appellant's action to restrain the state tax commission from enforcement of the [fol. 25] occupation tax statute resulted, as stated above, in dismissal of the action following sustaining of demurrer to the complaint.

Appellant contends that the imposition of the occupation tax upon it constitutes a direct impost upon the gross proceeds of appellant's foreign and interstate business; therefore, is in violation of article I, § 9, clause 5, and article I, § 10, clause 2, of the constitution of the United States, reading as follows:

"* * * No tax or duty shall be laid on articles exported from any state; * * *

"No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; * * *"

All persons engaged in business in this state are required by title II, ch. 180, L. 1935, to pay an occupation tax for the act or privilege of engaging in business activities.

The tax is measured by a percentage of the gross income solely of that business. In the case at bar the tax is measured by a percentage of the appellant's gross income, consisting of the commissions of eight cents a box for apples and ten cents a box for pears produced in the state of Washington and sold and shipped to points within and without this state. The tax which the state tax commission seeks to exact of the appellant is a tax laid for the purpose of revenue only and is measured, not by the sales price of the fruit, but by the amount received by the appellant for its services as the exclusive agent of the growers fixed on a "per box" basis.

The United States Supreme Court held in Crew Levick Company v. Pennsylvania, 245 U. S. 292, that a state tax [fol. 26] on the business of selling goods in foreign commerce measured by a percentage of the entire business transacted is both a regulation of foreign commerce and an impost, or duty on exports, and is, therefore, void.

"There is no question that the state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination . . . ." Cooney v. Mountain States Telephone & Telegraph Co., 294 U. S. 384.

The appellant may not successfully invoke the rule that if a contract of sale requires transportation across state lines the connection is so close as to render the sale itself immune from taxation. In the case at bar we are not dealing with a sale, but with a contract of agency—a contract for services to be rendered by appellant for the fruit growers.

The occupation tax is imposed upon all persons for the privilege of engaging in business activities in this state. The appellant is a domestic corporation operating, entirely within this state, a business which is exclusively with his principals, certain fruit growers; and for its services to its principals the appellant is paid a commission as recited above. The tax imposed upon the appellant is not upon imports or exports or interstate or foreign commerce. Ap-

pellant is not a necessary factor in such commerce. Appellant renders an independent service—engages in a business within this state—which is advantageous to those who form a component part or link in such commerce, but that does not render invalid the imposition of the occupation [fol. 27] tax as it is not in conflict or inconsistent with the Federal constitution.

In Ficklen v. Shelby County Taxing District, 145 U. S. 1, it was held that a license tax measured by gross commissions imposed on factors and brokers buying or selling on commission as applied to a commission merchant who negotiated sales on behalf of principals residing in other states with respect to goods located in other states was valid. The court stated that the tax was clearly levied upon the complainants in respect to the general commission business they conducted and not on the principal of the complainants. The court said:

"No doubt can be entertained of the right of a state legislature to tax trades, professions and occupations, in the absence of inhibition in the state constitution in that regard; and where a resident citizen engages in general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution • • •

"This tax is not on the goods, or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce."

In Crew Levick Company v. Commonwealth of Pennsylvania, 245 U. S. 292, cited above, Ficklen v. Shelby County Taxing District, 145 U. S. 1, was distinguished, and in the course of its opinion the court said:

"• • • Besides, *the tax imposed* in the *Ficklen Case was not* directly *upon the business* itself or *upon the volume* thereof, *but upon the amount of commissions earned* by the brokers, which, although probably corresponding with the volume of the transactions, was not necessarily proportionate thereto. For these and other reasons the case has been deemed exceptional." (Italics ours.)

In American Manufacturing Company v. City of St. Louis, 250 U. S. 459, the court had under consideration an ordinance conditioning the right to manufacture goods within the city upon payment of a license tax computed upon [fol. 28] the amount of the sales of the goods. It was contended that the ordinance, in effect, imposed a tax on sales of goods in the course of interstate commerce. In holding that the ordinance did not impose a tax on sales, the court said:

"* * * No tax has been or is to be imposed upon any sales of goods by plaintiff in error except goods manufactured by it in St. Louis under a license conditioned for the payment of a tax upon the amount of the sales when the goods should come to be sold. The tax is computed according to the amount of the sales of such manufactured goods, irrespective of whether they be sold within or without the State, in one kind of commerce or another; and payment of the tax is not made a condition of selling goods in interstate or in other commerce, but only of continuing the manufacture of goods in the City of St. Louis.

"There is no doubt of the power of the State or of the city acting under its authority, to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city. Unless some particular interference with federal right be shown, the States are free to lay privilege and occupation taxes."

We do not agree with the argument, that as sales of Washington fruit for delivery without the state made directly by appellant's principals are immune from the tax in question, appellant is entitled to the same immunity as it is merely a local agent for growers and associations in this state who have fruit to be sold. If those fruit growers and associations choose to make sales through the medium of an agent or independent contractor, as in the case at bar, the agent's or contractor's activities in this state in making and promoting the sales are subject to state taxation like any other local business.

Counsel for appellant cite as sustaining authority Puget Sound Stevedoring Company v. The Tax Commission of the State of Washington, 189 Wash. 131, 63 P. (2d) 532, 82 L. Ed. 64, — U. S. —. In that case we sustained, against the protest of the taxpayer that an unlawful burden was [fol. 29] imposed thereby upon interstate and foreign com-

merce, a tax laid upon the business of a stevedoring company, the amount of the tax being measured by a percentage of the gross receipts of the stevedoring company. The United States Supreme Court reversed our decision on the ground that the taxpayer was actually engaged in interstate commerce. The court said:

"The fact is stipulated, however, that no matter by whom the work is done or paid for, 'stevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at the "first place of rest", and vice versa.' In such circumstances services beginning or ending in the hold or on the dock stand on the same plane for the purposes of this case as those at the ship's sling. The movement is continuous, is covered by a single contract, and is necessary in all its stages if transportation is to be accomplished without unreasonable impediments. The situation thus presented has no resemblance to that considered in Pennsylvania R. R. Co. v. Knight, 192 U. S. 21, 26 where an interstate railroad furnished its passengers with taxicab service to and from its terminus, the service being 'contracted and paid for independently of any contract or payment for strictly interstate transportation.' The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts."

Clearly, the citation is inapplicable.

The tax imposed in the case at bar is not directly upon the business itself or upon the volume of business, but upon the amount of commissions earned by the appellant. In principle the case at bar and Ficklen v. Shelby County Taxing District, 145 U. S. 1, are indistinguishable.

The sales made through the sales representatives of the appellant in other states were Washington contracts. The activities of those sales solicitors in other states did not transform appellant's business into interstate commerce [fol. 30] so as to exempt appellant from payment of the occupation tax of which it complains. See Hopkins v. United States, 171 U. S. 578, and Blumenstock Bros. v. Curtis Publishing Company, 252 U. S. 436.

We repeat, that if the sales and shipments of the Washington fruit by the owners to points without the state constituted interstate commerce, it does not follow that the serv-

ices performed by the appellant, as agent or contractor, are so connected with the interstate transactions as to make those services a part of the interstate commerce. Any effect, at most, of such services upon interstate commerce is but remote, indirect and incidental; therefore, such activities of appellant as agent or contractor are within the state's legitimate taxing power.

The judgment is affirmed.

Millard, J.

We concur: Holcomb, J. Beals, J. Blake, J. Geraghty, J. Simpson, J.

[fol. 31] IN SUPREME COURT OF WASHINGTON

No. 26793

DISSENTING OPINION

ROBINSON, J. (dissenting):

I dissent from the foregoing opinion because I think the majority are in error both as to the facts presented in the case and as to the principles of law applicable thereto. The factual error appears most prominently in the following pivotal excerpt from the opinion:

"* * * The appellant is a domestic corporation *operating, entirely within this state,* a business which is exclusively with his principals, certain fruit growers; and for its services to its principals the appellant is paid a commission as recited above. * * *" (Italics mine.)

The complaint alleges, and the demurrer admits, that the appellant is engaged in the business of distributing Washington grown apples and pears throughout the states of the Union, and in a number of foreign countries; that it maintains sales representatives at many points outside the state of Washington who at such points negotiate said sales and execute written contracts of sale "on behalf of the appellant." The appellant's compensation is fixed at so much per box, that is to say, it is calculated per unit of volume.

It further alleges:

"That as a further part of its business plaintiff handles the bills of lading on all shipments made in compliance

with the contracts of sale entered into in foreign and extra-state territory, most of said shipments being consigned to the plaintiff at extra-state points, and that through its foreign and extra-state representatives plaintiff attends to the delivery of said shipments and collects the proceeds therefrom which are thereafter forwarded to the plaintiff at Seattle, Washington, all in the course of interstate and foreign commerce."

All of these allegations (except, of course, the last nine words of the quotation) are admitted by the demurrer. I do not see how the majority can rightly say that these allegations describe a concern operating "entirely within this state." To me, it pictures a far-flung business, actively [fol. 32] operating in many of our sister states, and in a number of foreign countries, in distributing Washington grown apples and pears throughout the channels of trade, a concern which, however, has, for quite understandable reasons of convenience, chosen to incorporate itself and maintain its head office in the state of Washington, the source of the product which it is engaged in distributing.

That interstate and foreign commerce is not confined to transportation of goods from one state to another or from one country to another, but comprehends, in addition, all commercial intercourse between states and countries and all activities necessary to its accomplishment, is so elementary that the citation of judicial decisions so holding would be superfluous. It is obvious that the mere carriage or transportation of the Washington fruit to New York, Philadelphia, or Boston, or to London, Paris, or Rome, would be futile unless someone performed the various services with relation to the shipments which the appellant alleges it performs. Without these services the commerce involved could not be accomplished. Nor do I perceive any distinctive difference between the nature of the services performed by the appellant and the services performed by the railroad company which carries the fruit across the country, or the steamship company which carries it overseas.

As to the fruit growers, both the appellant and the transportation company are independent contractors. The appellant's services are paid for, not by a commission upon the value or sale price of the fruit, but are calculated per unit of volume. The transportation company's compensation is, to a large extent, directly proportionate to weight

[fol. 33] and volume. The services performed by each are services necessary to the commerce involved. Upon what theory, then, is it cheerfully admitted on the one hand that a tax upon the transportation costs (the freight) would be a direct burden upon interstate or foreign commerce, and hotly contended on the other hand that a tax upon the other equally necessary and inescapable distribution costs is not!

The fact is that, although the opinion of this court in Puget Sound Stevedoring Company v. Tax Commission of the State of Washington was reversed on November 8th last by the Supreme Court of the United States, — U. S. —, 58 S. Ct. 72, 88 L. Ed. Adv. Op. 64, its erroneous reasoning is by the majority again made the basis of decision in this case. In that case, the court held the compensation of the stevedoring company taxable because (1) earned wholly in a local business; and (2) carried on by an independent contractor. In this case, the majority attempts to fit the facts to (1) of that formula by reducing the appellant's status to that of a mere commission merchant performing a merely local service, and this is done notwithstanding the broad admissions of the demurrer to the contrary. Having done that to their satisfaction, the majority proceed to apply the exploded and discredited "independent contractor" theory originally announced in the reversed Puget Sound Stevedoring Company case, and thus arrive at their decision.

As justification for this rather strong language, I quote the following excerpt from the very heart of the majority opinion:

"* * * Appellant renders an independent service—engages in a business within this state— * * *."

And lest this be insufficient to prove the point, I quote [fol. 34] from that portion of the opinion which states the actual decision in the case:

"* * * it [the appellant] is merely a local agent for growers and associations in this state who have fruit to be sold. If those fruit growers and associations choose to make sales through the medium of an agent or independent contractor, as in the case at bar, the agent's or contractor's activities in this state in making and promoting the sales are subject to state taxation like any other local business."

The last sentence in the above quotation constitutes the decision in this case. It does not meet the test of either

reason or authority. The fruit growers made a contract with the appellant in which the appellant agreed to render, for so much per box, certain services in connection with exchanging their fruit for the money of consumers in other states and countries. Let it be assumed that they at the same time also made a contract with a railroad to perform the actual carriage required by this commerce. Would the railroad be any less an independent contractor than the appellant? If not, and no other answer is possible, could its compensation under its contract be taxed? The answer is no, even though it is an independent contractor—for such a tax would be a burden upon interstate and foreign commerce. Neither can the compensation of the appellant be taxed if its compensation is received for services rendered in interstate and foreign commerce. The nature of the service is wholly decisive, and whether or not it is rendered by an independent contractor has nothing whatever to do with the matter.

I do not pursue this subject further because, in the first place, it is vain to labor overmuch in attempting to establish the obvious, and, second, the question has been settled by authority binding upon this court. In reversing the judgment of this court in the Puget Sound Stevedoring [fol. 35] Company case, supra, the Supreme Court of the United States said, less than three months ago, that the judgment was

"* * * placed upon the ground that the taxpayer was an independent contractor engaged in a local business,"

and, speaking through Mr. Justice Cardozo, disposed of the "independent contractor" theory in the following words:

"The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. *What is decisive is the nature of the act, not the person of the actor.*" (Italics mine.)

The rationale of the majority opinion is, therefore, clearly unsound. I think the result is also. Whether it is or not wholly depends upon whether or not the appellant renders a foreign and interstate commerce service, as has been indicated at the beginning of this dissent. I think that

the complaint alleges facts which show that it does render such services in other states and in foreign countries, services indispensable to the accomplishment of the commerce involved, and some of them not differing in character from the services rendered by the carrier which transports the fruit.

The majority say that the appellant's business is entirely carried on in this state, and that it is in no sense interstate in character. But when it is admitted that the appellant, acting through its representative, which is the only way a corporation can act, calls on a dealer in New York or London, negotiates a sale of Washington fruit, makes a contract in its own name, and, subsequently, personally attends to the delivery and collection of the proceeds, I need more than I find in the majority opinion, and more than I think can be found anywhere else, to convince me that these acts are performed in the state of Washington, or that the collection of the freight, for example, is an act in any way differing in nature from a transportation company's col-
[fol. 36] lection on a C. O. D. shipment.

In my opinion, the rule or judgment appealed from should be reversed.

Robinson, J.

We concur: Main, J. Steinert, C. J.

[fol. 37] IN SUPREME COURT OF WASHINGTON

No. 26793. Thurston County No. 16434

GWIN, WHITE & PRINCE, INC., a Corporation, Appellant,

vs.

HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Constituting the State of Washington Tax Commission, Respondents

JUDGMENT—March 14, 1938

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 14th day of March, A. D. 1938, on motion of G. W. Hamilton, Attorney Gen-

eral, of counsel for respondents, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said Harold H. Henneford, et al., as State of Washington Tax Commission have and recover of and from the said Gwin, White & Prince, Inc., and from National Surety Corporation, surety, the costs of this action taxed and allowed at Fifty Three and 55/100 ($53.55) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 38] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR—Filed April 8, 1938

The petitioner and appellant assigns the following errors in the records and proceedings in this cause:

I

The Supreme Court of the State of Washington by its judgment erred in failing to hold that the operations of the appellant in selling and distributing throughout foreign states and countries, and collecting the sale price of, fruit grown in the State of Washington, form an essential and component part of Interstate and Foreign Commerce.

II

The Supreme Court of the State of Washington by its judgment erred in failing to hold that appellant is engaged solely in Interstate and Foreign Commerce.

III

The Supreme Court of the State of Washington by its judgment erred in holding that the imposition upon and collection from the appellant of the business and Occupation Tax (Chapter 191, Laws of Washington 1933, as amended by Chapter 57, Laws of Washington Extraordinary Session 1933, and Chapter 180 Laws of Washington 1935) upon its gross income, is not a tax or duty laid upon [fol. 39] articles exported from the State of Washington

in violation of Article I, Section 9, Clause 5 of the Constitution of the United States.

IV

The Supreme Court of the State of Washington by its judgment erred in holding that the imposition upon and collection from the appellant of the said Business and Occupation Tax upon its gross income does not constitute an impost or duty on exports in violation of Article I, Section 10, Clause 2 of the Constitution of the United States.

V

The Supreme Court of the State of Washington by its judgment erred in failing to hold that the imposition of the said Business and Occupation Tax upon appellant's gross income is an unlawful and illegal burden, hindrance, and obstruction upon Interstate and Foreign Commerce in violation of Article I, Section 8 of the Constitution of the United States.

VI

The Supreme Court of the State of Washington by its judgment erred in affirming the judgment of the Superior Court of Thurston County, Washington, denying the injunctive relief against the imposition and collection of the said Business and Occupation Tax upon appellant's gross income and in dismissing the action filed by the appellant and granting judgment in favor of the appellee.

VII

The Supreme Court of the State of Washington by its judgment erred in failing to grant to appellant the relief sought in this action and in failing to grant judgment in its favor.

Wherefore, on account of the errors hereinabove assigned [fols. 40-66] petitioner prays that the said judgment of the Supreme Court of the State of Washington, dated the 14th day of March, 1938, in the above-entitled cause be reversed and judgment be rendered in favor of this appellant.

Dated this 7th day of April, 1938.

Carl E. Croson, Ofell H. Johnson, Counsel for Appellant.

[File endorsement omitted.]

[fol. 67] Filed in Clerk's Office Supreme Court State of Washington, Apr. 8, 1938. Benj. T. Hart, Clerk

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IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Chief Justice of the Supreme Court of the State of Washington:

Your petitioner, Gwin, White & Prince, Inc., a corporation, respectfully shows:

That your petitioner is the appellant in the above entitled cause; that on February 3, 1936 your petitioner filed its complaint against the appellee above named in the Superior Court of the State of Washington for Thurston County alleging that a statute of the State of Washington, to-wit, The Business and Occupation Tax (Chapter 191 Laws of Washington 1933, as amended by Chapter 57 Laws of Washington Extraordinary Session 1933, and Chapter 180 Laws of Washington 1935, being Sections 8370-4 to 8370-15 inclusive, of Remington's Revised Statutes of the State of Washington, 1937 pocket supplement) which purports to impose a tax or excise upon the gross receipts of the petitioner for the privilege of engaging in the State of Washington in the business of marketing and delivering, as agent for growers and grower organizations in those states, apples and pears produced in the States of Washington and Oregon, is repugnant to and in conflict with Section 10 of Article I of the Constitution of the United States, in that said tax or excise constitutes an impost or duty on exports; and likewise is repugnant to and in conflict with Section 8 of Article I of the Constitution of the United [fol. 68] States in that said tax or excise constitutes an illegal interferance with interstate and foreign commerce.

Equitable grounds were alleged and the issuance of an injunction was requested against the appellees above named enjoining the enforcement of said Business and Occupation Tax against petitioner. Thereafter a demurrer to appellant's complaint, alleging said complaint did not state facts sufficient to constitute a cause of action, was duly filed by

appellees and the case was presented to the Honorable Judge of the Superior Court of Thurston County, the parties stipulating in writing that the Court might decide the case on the merits on defendant's demurrer and it being further stipulated in writing that appellant transacted its entire Washington State business under written contract with The Wenatchee-Okanogan Cooperative Federation, copy of which contract was attached to the said stipulation. At the conclusion of the hearing on the demurrer, the demurrer was sustained and on May 26, 1937 the order sustaining the demurrer to appellant's complaint was entered, together with judgment and decree of court denying the prayer of plaintiff's complaint and dismissing the action with costs, petitioner excepting to said judgment and decree and its exception being allowed.

An appeal from said final judgment and decree dismissing the action was taken to the Supreme Court of the State of Washington. The Supreme Court of the State of Washington, after a departmental hearing and a rehearing en banc, on February 9, 1938, affirmed the action of the lower Court, and final judgment was entered on March 14 denying the petitioner relief and affirming the dismissal of the action. The opinion of the Supreme Court in its entirety dealt with the question of the validity of The Business and Occupation Tax as applied to appellant, in respect to the constitu- [fol. 69] tion of the United States and found that said statute in its application to petitioner is not in conflict with or repugnant to Article I, Section 9 or Article I, Section 10, or the Commerce Clause of the Constitution of the United States.

Therefore, in accordance with Section 237-a of the Judicial Code (28 U. S. C. A. 344), and in accordance with the Rules of the Supreme Court of the United States your petitioner respectfully shows this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to-wit, under Section 237-a of the Judicial Code (28 U. S. C. A. 344), a review could be had in the Supreme Court of the United States on an appeal (writ of error) as a matter of right. The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of

the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Supreme Court of the State of Washington, the highest Court of said State in which a decision in this case can be had, to the Supreme Court of the United States in order that the decision and final judgment of the said Supreme Court of the State of Washington may be examined and reversed, and also prays that a transcript of the records, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of the State of Washington, under his hand and the seal of said Court, may be sent to the Supreme Court of the United States as provided by law, and that an order be made, adjudging the security to be required of the petitioner, and that the cost bond tendered by the petitioner be approved.

Carl E. Croson, Ofell H. Johnson, Attorneys for Petitioners.

[fol. 70] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed April 8, 1938

The petition of Gwin, White & Prince, Inc., a corporation, the appellant in the above-entitled cause, for an order allowing an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Washington, having been filed with the Clerk of this Court and presented herein, accompanied by an assignment of errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the Records in this cause having been considered; it is hereby

Ordered that an appeal be, and it is hereby allowed to the Supreme Court of the United States of America from the final judgment, dated the 14th day of March, 1938, of the Supreme Court of the State of Washington as prayed in said petition, and that the Clerk of the Supreme Court of the State of Washington shall within sixty days from this date make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein which shall

be designated by praecipe and stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States; it is further

[fol. 71] Ordered that said appellant shall give a good and sufficient cost bond in the sum of One thousand Dollars; that said appellant shall prosecute said appeal to effect and answer all costs, if it fails to make the plea good.

Dated this 8th day of April, 1938.

William J. Steinert, Chief Justice of the Supreme Court of the State of Washington.

[File endorsement omitted.]

[fols. 72-74] Supersedeas bond on appeal for $1,000.00 approved and filed April 8, 1938, omitted in printing.

[fols. 75-78] Citation, in usual form showing service on G. W. Hamilton et al., filed April 8, 1938, omitted in printing.

[fol. 79] In Supreme Court of the United States

[Title omitted]

Stipulation as to Transcript of Record—Filed April 8, 1938

It is hereby stipulated between Gwin, White & Prince, a corporation, appellant above named, and the Tax Commission of the State of Washington and Harold H. Henneford, Thomas S. Hedges, and T. M. Jenner, members of said Commission, the appellee above named, by and through their respective counsel, as follows:

That the Clerk of the Supreme Court of the State of Washington, is hereby instructed to prepare the record on appeal in the above entitled cause, and that the following papers shall be included in and shall constitute said record on appeal:

1. Complaint.
2. Stipulation and Exhibit "A" thereto.
3. Demurrer.
4. Memorandum opinion of the Superior Court.
5. Order of Superior Court sustaining Demurrer dated May 26, 1937.
6. Judgment of Superior Court dated May 26, 1937.
7. Notice of appeal to the Supreme Court of the State of Washington.
8. Assignments of error on appeal to the Supreme Court of the State of Washington.

[fol. 80] 9. Order of the Supreme Court of the State of Washington assigning the above entitled cause for rehearing en banc.

10. Opinion of the Supreme Court of the State of Washington and dissenting opinion thereto.

10a. Judgment of the Supreme Court of the State of Washington.

11. Assignments of error on appeal to the Supreme Court of the United States.

12. Statement as to jurisdiction with attached copy of the decision of the Superior Court of Thurston County and the Supreme Court of the State of Washington.

13. Petition for appeal.

14. Order allowing appeal and fixing cost bond.

15. Cost bond.

16. Citation.

17. Statement directing attention to United States Supreme Court Rule 12.

18. Proof of service of papers required by United States Supreme Court Rule 12.

18a. Appellants statement of points to be relied upon and designation of parts of the record to be printed.

19. Stipulation for transcript on appeal.

20. Clerk's certificate.

Dated this 7th day of April, 1938.

Carl E. Croson, Ofell H. Johnson, Counsel for Appellant. G. W. Hamilton & R. G. Sharpe, Counsel for Appellee.

[File endorsement omitted.]

[fol. 81] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 82] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED.—Filed May 31, 1938

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record as filed is necessary for the consideration of the case.

Dated this 7th day of April, 1938.

Carl E. Croson, Ofel H. Johnson, Counsel for Appellant.

Due and timely service of the foregoing "Appellant's Statement of Points to be Relied Upon and Designation of Parts of the Record to be Printed" acknowledged this 8th day of April, 1938.

G. W. Hamilton & R. G. Sharpe, Counsel for Appellee.

[fol. 83] [File endorsement omitted.]

Endorsed on cover: File No. 42,560. Washington Supreme Court. Term No. 75. Gwin, White & Prince, Inc., appellant, vs. Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Constituting the State of Washington Tax Commission. Filed May 31, 1938. Term No. 75, O. T., 1938.

FILE COPY

FILED

MAY 3, 1928

CHARLES ELMORE CROPLEY

CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 75

GWIN, WHITE & PRINCE, INC.,

Appellant,

vs.

HAROLD E. HENNEFORD, THOMAS S. HEDGES AND T. E. JENNINGS, CONSTITUTING THE STATE OF WASHINGTON TAX COMMISSION,

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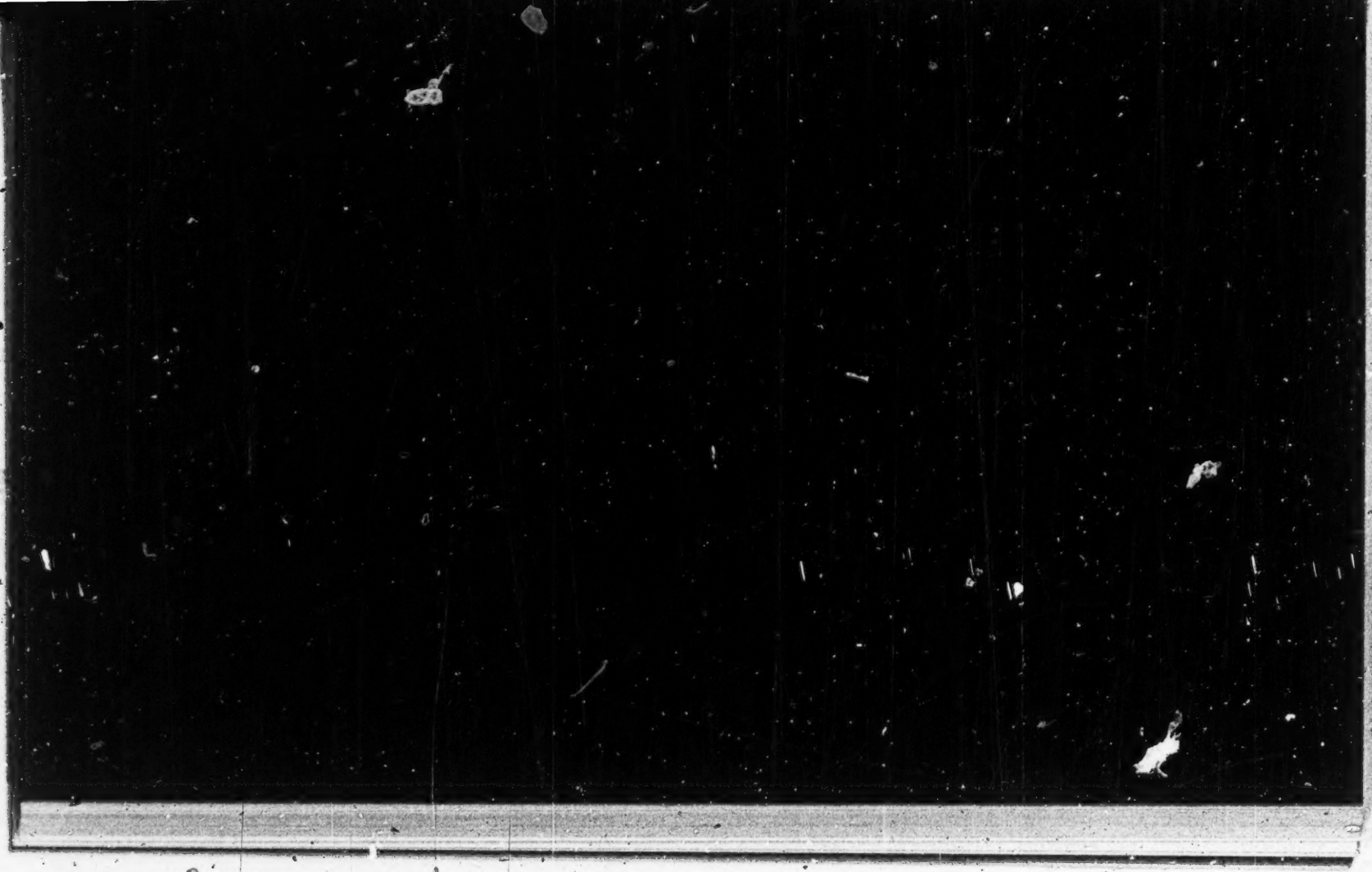
APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

Carl E. Cramer,
Orrin H. Johnson,
Counsel for Appellants.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 75

GWIN, WHITE & PRINCE, INC., A CORPORATION,
Appellant,

vs.

HAROLD H. HENNEFORD, THOMAS S. HEDGES AND T. M. JENNER, CONSTITUTING THE STATE OF WASHINGTON TAX COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12-1 of the Rules of the Supreme Court of the United States, appellant submits this statement as to jurisdiction showing the basis upon which it contends that this Court has jurisdiction upon appeal to review the action of the Supreme Court of the State of Washington.

This appeal was submitted to the court of first instance upon the pleadings which consisted of plaintiff's complaint

and the defendants' demurrer to that complaint. The facts as shown by the pleadings are as follows:

Facts of the Case.

The appellant, Gwin, White & Prince, Inc., acting solely as agent of various growers and grower organizations in the States of Washington and Oregon, is a Washington corporation engaged in the business of marketing apples and pears produced in said States, making deliveries of fruit so sold, collecting the sales price, and remitting the net balance, with its accounting therefor, to said growers and grower organizations. The sales and shipments so made are in interstate or foreign commerce.

The stipulation entered into by the parties hereto and the contract attached to the stipulation show that the appellant transacts its entire business originating in the State of Washington under written contract with the Wenatchee-Okanogan Cooperative Federation made up of approximately twelve cooperative grower associations in the State of Washington, and that under said contract the appellant is bound to sell the products of the Federation, namely, apples and pears, and to obtain the widest possible distribution thereof; to inform the Federation and its members as to marketing conditions; to permit the investigation of its books and records by the Federation or its members; to be responsible for collections on all sales made by appellant or all shipments where the bill of lading runs to appellant or its order; to handle all traffic matters pertaining to shipments; and to attend to claims against carriers or others.

In the conduct of its business as agent for the growers the appellant maintains sales representatives at many points outside of the State of Washington, who, on behalf of the appellant, negotiate sales and on approval by the appellant of the same, execute at said points outside of the State of

Washington and on behalf of the plaintiff, written contracts of sale. The appellant also sends to its representatives outside of the State of Washington, in the performance of its duties, bulletins listing cars of fruit, some of which cars are at the time either stored outside of the State of Washington or are already moving in interstate commerce. The appellant spends very large sums of money on telegraph, telephone, and cable communications, all in foreign or interstate commerce, and further handles all bills of lading on all shipments made in compliance with the contracts of sale entered into with foreign and extra-state purchasers. Through its foreign and extra-state representatives, appellant attends to the delivery of said shipments and collects the proceeds therefrom which are thereafter forwarded to the appellant at Seattle, Washington.

For the performance of these services, appellant is paid the sum of eight cents per box for apples and ten cents per box for pears, which amount is deducted from the proceeds of sales by appellant prior to payment to the Federation.

Statute under Which Jurisdiction of Supreme Court is Invoked.

The jurisdiction of this Court is invoked under Section 237-a of the United States Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928 (Title 28, U. S. C., Sections 344-a, 861-a, 861-b).

Statutes of the State of Washington Here Challenged.

The statutes of the State of Washington, the validity of which is involved, are Chapter 191, Laws of Washington, 1933 (pp. 869, *et seq.*), as amended by Chapter 57, Laws of Washington Extraordinary Session 1933 (pp. 157, *et seq.*), and Chapter 180, Laws of Washington 1935, Sections 4 to 15 (pp. 709, *et seq.*), Sections 185 to 210, inclusive (pp. 830,

et seq.), and Section 216 (p. 849). These statutes create what is commonly known as the "Business and Occupation Tax."

Laws of Washington 1933.

Chapter 191, Laws of Washington 1933, Sec. 2 (2) (p. 871) provides in part:

> "* * * there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against * * * gross income * * *"

Section 1 (6) (p. 869) provides in part:

> "The term 'gross income' means * * * all receipts, actually received by reason of * * * the business engaged in, * * * without any deduction on account of * * * labor costs, * * * or any other expenses whatsoever * * *"

Subsequent sections of the Act provide for its administration by the appellees and provide stringent penalties in the event persons subject to the Act fail to comply therewith.

Laws of Washington Extraordinary Session 1933.

It was by Chapter 57, Laws of Washington Extraordinary Session 1933 (pp. 157, *et seq.*), which amended Chapter 191, Laws of Washington 1933 (pp. 869, *et seq.*), that an attempt was first made to subject the business of the appellant to the provisions of the earlier act by the addition of a new section to be known as 2-a. This section provides in part as follows:

> "(1) From and after the first day of January, 1934, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, * * *

an annual tax or excise for the privilege of engaging in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent; * * *."

Laws of Washington 1935.

Chapter 180, Laws of Washington 1935, Section 4 (p. 709) provides in part as follows:

"From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against * * * gross income of the business, * * * as follows: * * *."

Section 4-(e) (pp. 710, *et seq.*) provides in part as follows:

"Upon every person engaging within this state in any business activity * * * as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one-half of one per cent. * * *."

Section 5-(g) (pp. 712, *et seq.*) provides in part as follows:

"The term 'gross income of the business' means the * * * compensation for the rendition of services, * * * all without any deduction on account of * * * labor costs, * * * or any other expense whatsoever paid or accrued and without any deduction on account of losses;"

Section 216 (p. 849) provides in part as follows:

"No tax shall be imposed under the provisions of chapter 191, Laws of 1933, as amended by chapter 57, Laws of 1933, Extraordinary Session, State of Washington, with respect to the period beginning May 1, 1935, and ending July 31, 1935, and the provisions of such act shall be deemed amended in conformity herewith. * * *."

Other sections of the Act provide for its administration by the appellees and provide stringent penalities in the event persons subject to the Act fail to comply therewith.

The statutes referred to above have been before the Supreme Court of the State of Washington and before the Supreme Court of the United States on several occasions. It is now well settled that the tax is not a property tax. It is an excise tax measured by and imposed upon gross income. It is imposed upon the privilege of engaging in business. It is solely a revenue measure and not an exercise of the police power of the State.

State ex rel. Stiner v. *Yelle*, 174 *Wash.* 402, 25 Pac. (2d) 91;

Cascade Telephone Co. v. *State Tax Commission*, 176 Wash. 616, 30 Pac. (2d) 974;

Supply Laundry v. *Jenner*, 178 Wash. 72, 34 Pac. (2d) 363;

Paramount v. *Hennefard*, 184 Wash. 376, 51 Pac. (2d) 385; certiorari denied 298 U. S. 665;

Northern Pacific v. *State Tax Commission*, 297 U. S. 403, affirming 183 Wash. 33, 48 Pac. (2d) 931;

Fisher's Blend, Inc. v. *Tax Commission*, 297 U. S. 650, reversing 182 Wash. 163, 45 Pac. (2d) 942; 49 Pac. (2d) 115.

Judgment of the Supreme Court of the State of Washington.

The judgment of the Supreme Court of the State of Washington sought to be reversed was entered February 9, 1938. The time for taking an appeal began to run from the date of said judgment. (See *Puget Sound Power & Light Company* v. *King County*, 264 U. S. 22, where the time for taking an appeal from the judgment of the Supreme Court of the State of Washington is considered). The petition for appeal is presented April 8th, 1938.

The judgment and decree of the Trial Court dated May 26, 1937, provides in part:

> "It is by the court ordered, adjudged, and decreed that the prayer of plaintiff's complaint be and the same hereby is denied, and that this action be and it hereby is dismissed with statutory costs to be taxed."

The judgment of the Supreme Court of the State of Washington affirms the judgment and decree of the Trial Court. A judgment of dismissal is final.

Wilson v. *Republic Iron & Steel Company*, 257 U. S. 92;

Gulf Refining Co. v. *United States*, 269 U. S. 125;

Fisher's Blend, Inc. v. *Tax Commission*, 297 U. S. 650.

Court Appealed from is Highest Court of the State of Washington.

The judgment of the Supreme Court of the State of Washington is that of the highest Court in which, under the laws of the State of Washington, such judgment could be had. No further appeal is possible save for the Supreme Court of the United States; hence, the appeal is taken from "a final judgment or decree in any suit in the highest Court of the State in which a decision in the suit could be had."

Constitution of the State of Washington, Art. IV, Sections 1, 4 and 6.

See—

Remington's Revised Statutes of Washington, 1932, Vol. 1, pp. 422, 425, 428;

Remington's Revised Statutes of Washington, 1932, Vol. 4, Sec. 1716, p. 10;

Section 1737, p. 72;

Section 1740, p. 74;

Section 1741, p. 75.

How the Federal Question Was Raised.

The questions sought to be reviewed in this Court were raised in the Superior Court of Thurston County (the court of first instance) by appellant's complaint of which Paragraphs III, IV, V, VII, and IX are as follows:

"III.

That the plaintiff, acting solely as agent for various growers and grower organizations in the States of Washington and Oregon is engaged in the business of marketing apples and pears produced in the said States of Washington and Oregon and in making deliveries of fruit so sold, collecting the sales price and remitting the net balance thereof to said growers and grower organizations.

IV.

That all of the sales of fruit made by the plaintiff are made in the course of interstate and foreign commerce save and except an occasional sale of a small quantity of fruit sometimes made within the State of Washington. That with the foregoing insignificant exception all of the fruit so sold by the plaintiff is shipped and delivered outside of the State of Washington to purchasers who are non-residents of the State of Washington, said fruit going to all parts of the United States and a very large portion thereof to foreign countries.

V.

That as a part of plaintiff's business it has sales representatives in very many points outside of the State of Washington, who on behalf of the plaintiff, negotiate said sales and on approval of the plaintiff of the same execute in said points outside of the State of Washington and on behalf of the plaintiff written contracts of sale. That also as a part of its business plaintiff during the fruit season, which extends over

a large portion of the calendar year, sends to its aforesaid representatives outside of the State of Washington daily bulletins listing cars of fruit, some of which are at the time either stored outside the State of Washington or are already moving in cars in interstate commerce. That in conducting its aforesaid business and in making said sales, all of which, both as to origin and completion, are interstate or foreign commerce, plaintiff expends very large sums of money in telephone, telegraph and cable communications, all in interstate and foreign commerce. That as a further part of its business, plaintiff handles the bills of lading on all shipments made in compliance with the contracts of sale entered into in foreign and extra-state territory, most of said shipments being consigned to the plaintiff at extra-state points, and that through its foreign and extra-state representatives plaintiff attends to the delivery of said shipments and collects the proceeds therefrom, which are thereafter forwarded to the plaintiff at Seattle, Washington, all in the course of interstate and foreign commerce.

* * * * * * *

VII.

That the business of the plaintiff, as hereinbefore set forth, constitutes all its business, and that the same, both as to the inception and completion of said sales and the delivery of said fruit, consists of interstate and foreign commerce, and that the plaintiff's income is wholly derived from such interstate and foreign commerce.

* * * * * * *

IX.

That the enforcement of the collection of said business tax by the defendants against the plaintiff is in violation of the Commerce Clause of the Constitution of the United States and constitutes an illegal interference with interstate and foreign commerce in con-

travention of the laws of the United States, and constitutes an impost or duty on exports in violation of Section 10, Article I of the Constitution of the United States."

Paragraphs VIII and X of the complaint set forth equitable grounds for relief. A demurrer to the complaint was filed in the action by the appellees, and the matter was submitted on the merits on the demurrer to the court for adjudication. The trial court delivered a memorandum opinion, copy of which is attached hereto and made a part hereof. The decision of the trial court held that the demurrer should be sustained, not upon the ground that the appellant is not engaged in interstate commerce but upon the ground that the tax is upon the privilege of the domestic corporation to exist in the state. On May 26, 1937, the trial court entered a final judgment dismissing the action, to all of which the appellant duly excepted and its exception was allowed. An appeal was taken to the Supreme Court of the State of Washington, the appellant urging in its assignment of error the same constitutional grounds set forth in its complaint. Such assignments of error to the Supreme Court of the State of Washington appear in the brief of appellant in that Court in accordance with State practice.

Remington's Revised Statutes of Washington 1932, Vol. 4, Sec. 1730, p. 31;

Remington's Revised Statutes of Washington 1932, Vol. 1, p. 146, Rules of the Supreme Court, Rule VIII.

The third of such assignments of error was as follows:

"3. The trial court erred in holding that the imposition and collection from the appellant from the Business and Occupation Tax does not impose a burden upon interstate and foreign commerce, in violation of the Commerce Clause of the Constitution of the United

States, and that the imposition of said tax upon appellant does not violate Article I, Section 9, Clause 5, and Article I, Section 10, Clause 2 of the Constitution of the United States as being an impost or duty on exports."

The Supreme Court of the State of Washington affirmed the judgment of the Superior Court of Thurston County and in its opinion, copy of which is hereto attached and made a part hereof, held as follows:

(1) That the services rendered by appellant are performed wholly within the State of Washington.

(2) That such services are related only incidentally to interstate and foreign commerce, and that appellant is not a necessary factor in such commerce.

"We repeat, that if the sales and shipments of the Washington fruit by the owners to points without the state constituted interstate commerce, it does not follow that the services performed by the appellant, as agent or contractor, are so connected with the interstate transactions as to make those services a part of the interstate commerce. Any effect, at most, of such services upon interstate commerce is but remote, indirect and incidental; therefore, such activities of appellant as agent or contractor are within the state's legitimate taxing power."

The opinion and judgment which the Supreme Court rendered and entered could not have been rendered and entered without denying to appellant all the rights asserted to be its under the constitutional privileges relied upon and said opinion and judgment cannot be rested upon any independent non-Federal grounds.

It is submitted that the judgment plainly and definitely draws in question the validity of the statute as applied to appellant, on the ground of its being repugnant to the Constitution of the United States, as required by Section 237

of the Judicial Code, as amended, and that this appeal comes within the proper jurisdiction of this Court.

Bryant v. *Zimmerman*, 278 U. S. 63, 67.

Questions Involved are Substantial as Shown by Repeated Decisions of This Court.

The following cases substantiate appellant's contention that one engaged in an essential and component part of, and link in, interstate and foreign commerce is himself engaged in interstate and foreign commerce, and that the questions involved are substantial.

McCall v. *California*, 136 U. S. 104;
Texas Transport & T. Co. v. *New Orleans*, 264 U. S. 150;
Desanto v. *Pennsylvania*, 273 U. S. 34;
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282;
Lemke v. *Farmer's Grain Company*, 258 U. S. 50;
Puget Sound Stevedoring Co. v. *Tax Commission*, 82 U. S. Supreme Court Law Ed. Advance Opinions, page 64;
Fisher's Blend, Inc. v. *Tax Commission*, 297 U. S. 650.

The complaint of appellant alleges and the demurrer of the appellee admits that appellant operates a far-flung business actively operating in many foreign states and countries, making sales in and deliveries to extra-state and foreign points.

As appellant is engaged solely in interstate and foreign commerce, the imposition of the Business and Occupation Tax in the States of Washington and Oregon upon its gross receipts is in violation of Article I, Section 9, and Article I, Section 10 of the Constitution of the United States and is in direct violation of the Commerce Clause of the Constitution of the United States.

Respectfully submitted,

CARL E. CROSON,
OFELL H. JOHNSON,
Counsel for Appellant.

EXHIBIT "A".

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THURSTON COUNTY

No. 16434

GWIN, WHITE & PRINCE, INC., a Corporation, *Plaintiff*,

vs.

HAROLD HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Constituting the State Tax Commission, *Defendants*.

Memo. Opinion.

I have very carefully considered the authorities cited by counsel and still feel that the question is a very close one. I am of the opinion that the defendants' demurrer should be sustained, not upon the ground that the plaintiff is not engaged in interstate commerce, but upon the ground that it is a domestic corporation and that the tax levied is not a tax upon interstate commerce but upon the privilege of the domestic corporation to exist in the state.

D. F. WRIGHT,
Judge.

EXHIBIT "B".

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 26793. En Banc.

GWIN, WHITE & PRINCE, INC., a Corporation, *Appellant*,

v.

HAROLD H. HENNEFORD, THOMAS S. HEDGES, and T. M. JENNER, Constituting the State of Washington Tax Commission, *Respondents*.

Filed Feb. 9th, 1938

This action was instituted by Gwin, White & Prince, Inc., a domestic corporation of Seattle, to restrain the state tax

commission from enforcing against the plaintiff the provisions of title II, ch. 180, L. 1935, for collection of a business or occupation tax from all persons engaged in business activities in the State of Washington. The appeal is from the judgment of dismissal rendered after a demurrer had been sustained to the complaint.

The facts presented by the allegations of the complaint, which are admitted by the demurrer to be true, and the stipulation of the parties, are in substance as follows: The appellant, acting solely as agent of various growers and grower organizations in Washington and Oregon, is engaged in the business of marketing apples and pears produced in Washington and Oregon and in making deliveries of fruit so sold. The growers and grower organizations have the exclusive authority to fix the price at which their or its products may be sold by appellant who is required to collect the sales price of fruits sold and to deposit the proceeds of the sales in a separate fund entitled "Gwin, White & Prince, Inc., Trustee". From this fund appellant deducts its charges as fixed by the contract of the appellant with the growers and pays the balance to the contracting organization. Appellant transacts its entire business originating in the state of Washington under a written contract with the Wenatchee-Okanogan Co-Operative Federation made up of approximately twelve co-operative associations in this state. Under the terms of that contract appellant is the exclusive agent of the federation to sell and collect the proceeds from sales of all commercially packed apples and pears which come into the possession or control of the federation as agent for its members. By that contract the appellant is obligated to sell the fruit and to obtain the widest possible distribution of same, to inform the federation and its members as to marketing conditions, to be responsible for collections on all sales made by appellant on all shipments where the bill of lading runs to appellant or its order, to handle all traffic matters pertaining to shipments and to attend to the collection of claims against carriers or others. The compensation to be paid to appellant for its services under the contract is eight cents a box for apples and ten cents a box

for pears. Except for an occasional sale of a small amount of fruit made within this state, all of the fruit sold is shipped to points outside the state of Washington; that is, the fruit is shipped to other states and to foreign countries. In the conduct of its business as agent for the fruit growers, the appellant maintains sales representatives in many points outside of the state of Washington, both within the United States and in Europe, whose duty is to negotiate sales, and who execute written contracts of sale in appellant's name and on its behalf at their respective places of business outside of the state of Washington.

As a part of its business, the appellant sends to its representatives outside of this state daily bulletins listing cars of fruit which are for sale. The appellant gives shipping directions to the respective growers and sellers and handles all of the bills of lading on shipments, most of which are consigned to appellant at points outside of this state. Upon arrival of the fruit at its destination, appellant attends to the delivery of shipments and collection of the proceeds therefrom.

Upon the ground that it is acting only as an agent for the fruit growers and that it is engaged solely in interstate commerce, appellant has never taken out a license under the commission merchants law of this state. The state tax commission's demand for payment of a business or occupation tax upon the appellant's gross revenue (commission of eight cents a box for apples and ten cents a box for pears) derived from the business done by the appellant under its contract as agent of the fruit growers was rejected. That is, the state tax commission's claim of a tax liability on the total commissions appellant receives from the growers for Washington-grown fruit sold and shipped to points within and without this state was denied. Appellant's action to restrain the state tax commission from enforcement of the occupation tax statute resulted, as stated above, in dismissal of the action following sustaining of demurrer to the complaint.

Appellant contends that the imposition of the occupation tax upon it constitutes a direct impost upon the gross proceeds of appellant's foreign and interstate business;

therefore, is in violation of article I, Sec. 9, clause 5, and article I, Sec. 10, clause 2, of the constitution of the United States, reading as follows:

> "* * * No tax or duty shall be laid on articles exported from any state; * * *.
>
> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; * * *.

All persons engaged in business in this state are required by title II, ch. 180, L. 1935, to pay an occupation tax for the act or privilege of engaging in business activities. The tax is measured by a percentage of the gross income solely of that business. In the case at bar the tax is measured by a percentage of the appellant's gross income, consisting of the commissions of eight cents a box for apples and ten cents a box for pears produced in the state of Washington and sold and shipped to points within and without this state. The tax which the state tax commission seeks to exact of the appellant is a tax laid for the purpose of revenue only and is measured, not by the sales price of the fruit, but by the amount received by the appellant for its services as the exclusive agent of the growers fixed on a "per box" basis.

The United States Supreme Court held in *Crew Levick Company* v. *Pennsylvania*, 245 U. S. 292, that a state tax on the business of selling goods in foreign commerce measured by a percentage of the entire business transacted is both a regulation of foreign commerce and an impost, or duty on exports, and is, therefore, void.

> "There is no question that the state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of the business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimina-

tion. * * * " *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384.

The appellant may not successfully invoke the rule that if a contract of sale requires transportation across state lines the connection is so close as to render the sale itself immune from taxation. In the case at bar we are not dealing with a sale, but with a contract of agency—a contract for services to be rendered by appellant for the fruit growers.

The occupation tax is imposed upon all persons for the privilege of engaging in business activities in this state. The appellant is a domestic corporation operating, entirely within this state, a business which is exclusively with his principals, certain fruit growers; and for its services to its principals the appellant is paid a commission as recited above. The tax imposed upon the appellant is not upon imports or exports or interstate or foreign commerce. Appellant is not a necessary factor in such commerce. Appellant renders an independent service—engages in a business within this state—which is advantageous to those who form a component part or link in such commerce, but that does not render invalid the imposition of the occupation tax as it is not in conflict or inconsistent with the Federal constitution.

In *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, it was held that a license tax measured by gross commissions imposed on factors and brokers buying or selling on commission as applied to a commission merchant who negotiated sales on behalf of principals residing in other states with respect to goods located in other states was valid. The court stated that the tax was clearly levied upon the complainants in respect to the general commission business they conducted and not on the principal of the complainants. The court said:

"No doubt can be entertained of the right of a state legislature to tax trades, professions and occupations, in the absence of inhibition in the state constitution in that regard; and where a resident citizen engages in general business subject to a particular tax the fact

that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State, does not necesarily involve the taxation of interstate commerce, forbidden by the Constitution. * * *

"This tax is not on the goods, or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce."

In *Crew Levick Company* v. *Commonwealth of Pennsylvania*, 245 U. S. 292, cited above *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, was distinguished, and in the course of its opinion the court said:

"* * * Besides, *the tax imposed* in the *Ficklen Case was not* directly *upon the business* itself or *upon the volume* thereof, *but upon the amount of commissions earned* by the brokers, which, although probably corresponding with the volume of the transactions, was not necessarily proportionate thereto. For these and other reasons the case has been deemed exceptional." (Italics ours.)

In *American Manufacturing Company* v. *City of St. Louis*, 250 U. S. 459, the court had under consideration an ordinance conditioning the right to manufacture goods within the city upon payment of a license tax computed upon the amount of the sales of the goods. It was contended that the ordinance, in effect, imposed a tax on sales of goods in the course of interstate commerce. In holding that the ordinance did not impose a tax on sales, the court said:

"* * * No tax has been or is to be imposed upon any sales of goods by plaintiff in error except goods manufactured by it in St. Louis under a license conditioned for the payment of a tax upon the amount of the sales when the goods should come to be sold. The tax is computed according to the amount of the sales

of such manufactured goods, irrespective of whether they be sold within or without the State, in one kind of commerce or another; and payment of the tax is not made a condition of selling goods in interstate or in other commerce, but only of continuing the manufacture of goods in the City of St. Louis.

"There is no doubt of the power of the State, or of the city acting under its authority, to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city. Unless some particular interference with federal right be shown, the States are free to lay privilege and occupation taxes."

We do not agree with the argument, that as sales of Washington fruit for delivery without the state made directly by appellant's principals are immune from the tax in question, appellant is entitled to the same immunity as it is merely a local agent for growers and associations in his state who have fruit to be sold. If those fruit growers and associations choose to make sales through the medium of an agent or independent contractor, as in the case at bar, the agent's or contractor's activities in this state in making and promoting the sales are subject to state taxation like any other local business.

Counsel for appellant cite as sustaining authority *Puget Sound Stevedoring Company* v. *The Tax Commission of the State of Washington*, 189 Wash. 131, 63 P. (2d) 582, 82 L. Ed. 64, — U. S. —. In that case we sustained, against the protest of the taxpayer that an unlawful burden was imposed thereby upon interstate and foreign commerce, a tax laid upon the business of a stevedoring company, the amount of the tax being measured by a percentage of the gross receipts of the stevedoring company. The United States Supreme Court reversed our decision on the ground that the taxpayer was actually engaged in interstate commerce. The court said:

"The fact is stipulated, however, that no matter by whom the work is done or paid for, 'stevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at

> the "first place of rest", and vice versa.' In such circumstances services beginning or ending in the hold or on the dock stand on the same plane for the purposes of this case as those at the ship's sling. The movement is continuous, is covered by a single contract, and is necessary in all its stages if transportation is to be accomplished without unreasonable impediments. The situation thus presented has no resemblance to that considered in *Pennsylvania R. R. Co.* v. *Knight*, 192 U. S. 21, 26 where an interstate railroad furnished its passengers with taxicab service to and from its terminus, the service being 'contracted and paid for independently of any contract or payment for strictly interstate transportation.' The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefore a percentage of the gross receipts."

Clearly, the citation is inapplicable.

The tax imposed in the case at bar is not directly upon the business itself or upon the volume of business, but upon the amount of commissions earned by the appellant. In principle the case at bar and *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, are indistinguishable.

The sales made through the sales representatives of the appellant in other states were Washington contracts. The activities of those sales solicitors in other states did not transform appellant's business into interstate commerce so as to exempt appellant from payment of the occupation tax of which it complains. See *Hopkins* v. *United States*, 171 U. S. 578, and *Blumenstock Bros.* v. *Curtis Publishing Company*, 252 U. S. 436.

We repeat, that if the sales and shipments of the Washington fruit by the owners to points without the state consituted interstate commerce, it does not follow that the services performed by the appellant, as agent or contractor, are so connected with the interstate transactions as to make those services a part of the interstate commerce. Any effect, at most, of such services upon interstate commerce is but remote, indirect and incidental; therefore, such activi-

ties of appellant as agent or contractor are within the state's legitimate taxing power.

The judgment is affirmed.

MILLARD, J.

We concur:

HOLCOMB, J.
BEALS, J.
BLAKE, J.
GERAGHTY, J.
SIMPSON, J.

No. 26793

ROBINSON, J. (dissenting):

I dissent from the foregoing opinion because I think the majority are in error both as to the facts presented in the case and as to the principles of law applicable thereto. The factual error appears most prominently in the following pivotal excerpt from the opinion:

> "* * * The appellant is a domestic corporation *operating, entirely within this state,* a business which is exclusively with his principals, certain fruit growers; and for its services to its principals the appellant is paid a commission as recited above * * *." (Italics mine.)

The complaint alleges, and the demurrer admits, that the appellant is engaged in the business of distributing Washington grown apples and pears throughout the states of the Union, and in a number of foreign countries; that it maintains sales representatives at many points outside the state of Washington who at such points negotiate said sales and execute written contracts of sale "on behalf of the appellant." The appellant's compensation is fixed at so much per box, that is to say, it is calculated per unit of volume.

It further alleges:

> "That as a further part of its business plaintiff handles the bills of lading on all shipments made in com-

pliance with the contracts of sale entered into in foreign and extra-state territory, most of said shipments being consigned to the plaintiff at extra-state points, and that through its foreign and extra-state representatives plaintiff attends to the delivery of said shipments and collects the proceeds therefrom which are thereafter forwarded to the plaintiff at Seattle, Washington, all in the course of interstate and foreign commerce."

All of these allegations (except, of course, the last nine words of the quotation) are admitted by the demurrer. I do not see how the majority can rightly say that these allegations describe a concern operating "entirely within this state." To me, it pictures a far-flung business, actively operating in many of our sister states, and in a number of foreign countries, in distributing Washington grown apples and pears throughout the channels of trade, a concern which, however, has, for quite understandable reasons of convenience, chosen to incorporate itself and maintain its head office in the state of Washington, the source of the product which it is engaged in distributing.

That interstate and foreign commerce is not confined to transportation of goods from one state to another or from one country to another, but comprehends, in addition, all commercial intercourse between states and countries and all activities necessary to its accomplishment, is so elementary that the citation of judicial decisions so holding would be superfluous. It is obvious that the mere carriage or transportation of the Washington fruit to New York, Philadelphia, or Boston, or to London, Paris, or Rome, would be futile unless someone performed the various services with relation to the shipments which the appellant alleges it performs. Without these services the commerce involved could not be accomplished. Nor do I perceive any distinctive difference between the nature of the services performed by the appellant and the services performed by the railroad company which carries the fruit across the country, or the steamship company which carries it overseas.

As to the fruit growers, both the appellant and the transportation company are independent contractors. The appellant's services are paid for, not by a commission upon

the value or sale price of the fruit, but are calculated per unit of volume. The transportation company's compensation is, to a large extent, directly proportionate to weight and volume. The services performed by each are services necessary to the commerce involved. Upon what theory, then, is it cheerfully admitted on the one hand that a tax upon the transportation costs (the freight) would be a direct burden upon interstate or foreign commerce, and hotly contended on the other hand that a tax upon the other equally necessary and inescapable distribution costs is not?

The fact is that, although the opinion of this court in Puget Sound Stevedoring Company *v.* The Commission of the State of Washington was reversed on November 8th last by the Supreme Court of the United States, — U. S. —, 58 S. Ct. 72, 82 L. Ed. Adv. Op. 64, its erroneous reasoning is by the majority again made the basis of decision in this case. In that case, the court held the compensation of the stevedoring company taxable because (1) earned wholly in a local business; and (2) carried on by an independent contractor. In this case, the majority attempts to fit the facts to (1) of that formula by reducing the appellant's status to that of a mere commission merchant performing a merely local service, and this is done notwithstanding the broad admissions of the demurrer to the contrary. Having done that to their satisfaction, the majority proceed to apply the exploded and discredited "independent contractor" theory originally announced in the reversed Puget Sound Stevedoring Company case, and thus arrive at their decision.

As justification for this rather strong language, I quote the following excerpt from the very heart of the majority opinion:

> "* * * Appellant renders an independent service—engages in a business within this state * * *"

And lest this be insufficient to prove the point, I quote from that portion of the opinion which states the actual decision in the case:

> "* * * it (the appellant) is merely a local agent for growers and associations in this state who have

> fruit to be sold. If those fruit growers and associations chose to make sales through the medium of an agent or independent contractor, as in the case at bar, the agent's or contractor's activities in this state in making and promoting the sales are subject to state taxation like any other local business."

The last sentence in the above quotation constitutes the decision in this case. It does not meet the test of either reason or authority. The fruit growers made a contract with the appellant in which the appellant agreed to render, for so much per box, certain services in connection with exchanging their fruit for the money of consumers in other states and countries. Let it be assumed that they at the same time also made a contract with a railroad to perform the actual carriage required by this commerce. Would the railroad be any less an independent contractor than the appellant? If not, and no other answer is possible, could its compensation under its contract be taxed? The answer is no, even though it is an independent contractor—for such a tax would be a burden upon interstate and foreign commerce. Neither can the compensation of the appellant be taxed *if* its compensation is received for services rendered in interstate and foreign commerce. The nature of the service is wholly decisive, and whether or not it is rendered by an independent contractor has nothing whatever to do with the matter.

I do not pursue this subject further because, in the first place, it is vain to labor overmuch in attempting to establish the obvious, and, second, the question has been settled by authority binding upon this court. In reversing the judgment of this court in the Puget Sound Stevedoring Company case, *supra*, the Supreme Court of the United States said, less than three months ago, that the judgment was

> "* * * placed upon the ground that the taxpayer was an independent contractor engaged in a local business,"

and, speaking through Mr. Justice Cardozo, disposed of the "independent contractor" theory in the following words:

"The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. *What is decisive is the nature of the act, not the person of* the actor." (Italics mine.)

The rationale of the majority opinion is, therefore, clearly unsound. I think the result is also. Whether it is or not wholly depends upon whether or not the appellant renders a foreign and interstate commerce service, as has been indicated at the beginning of this dissent. I think that the complaint alleges facts which show that it does render such services in other states and in foreign countries, services indispensable to the accomplishment of the commerce involved, and some of them not differing in character from the services rendered by the carrier which transports the fruit.

The majority say that the appellant's business is entirely carried on in this state, and that it is in no sense interstate in character. But when it is admitted that the appellant, acting through its representative, which is the only way a corporation can act, calls on a dealer in New York or London, negotiates a sale of Washington fruit, makes a contract in its own name, and, subsequently, personally attends to the delivery and collection of the proceeds, I need more than I find in the majority opinion, and more than I think can be found anywhere else, to convince me that these acts are performed in the state of Washington, or that the collection of the freight, for example, is an act in any way differing in nature from a transportation company's collection on a C. O. D. shipment.

In my opinion, the rule or judgment appealed from should be reversed.

ROBINSON, *J.*

We concur:

MAIN, *J.*

STEINERT, *C. J.*

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1938

No. 75

GWIN, WHITE & PRINCE, INC.,
Appellant,

vs.

HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Constituting the State of Washington Tax Commission.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

FRANK S. BAYLEY,
CARL E. CROSON,
OFELL H. JOHNSON,
Counsel for Appellant.

900 Insurance Building,
Seattle, Washington.

Supreme Court of the United States

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

This is an appeal from the Supreme Court of the State of Washington. Statement as to jurisdiction was duly filed under Paragraph I of Rule 12 of the Revised Laws of the Supreme Court of the United States and probable jurisdiction was noted by this Court on October 10, 1938. The opinion in the Court below was reported in 193 Wash. 451; 75 Pac. (2d) 1017.

STATEMENT OF THE CASE

Appellant in this action seeks to enjoin the imposition upon its gross receipts of the so-called Business and Occupation Tax created by Chapter 191, Laws of Washington, 1933, as amended by Chapter 57, Laws of Washington, Extraordinary Session, 1933, as amended by Chapter 180, Laws of Washington, 1935. (Appendix I.) This case is submitted upon appellant's complaint (R. 1) and appellees' demurrer thereto (R. 13), and the additional facts stipulated to by the parties (R. 4).

The facts alleged in appellant's complaint and admitted by appellees' demurrer are that appellant is a Washington corporation, engaged in the business of marketing apples and pears produced in the States of Washington and Oregon. The appellant acts solely as agent of various growers and grower organizations in these states and in the performance of its duties makes sales and deliveries of the fruit produced by these growers, pursuant to contracts entered into by it with buyers located in the several states and in foreign countries. The appellant collects the sales price and remits the net balance, with its accounting therefor, to the above mentioned growers and grower organizations. These sales and shipments all are made in interstate or foreign commerce, with the exception of an occasional and insignificant sale within the State of Washington.

To appellant's complaint appellees demurred and it was subsequently stipulated that the matter be submitted to the trial Court on the merits on appellees' demurrer, together with the additional stipulated fact that appellant transacts its entire Washingon State business under written contract with the Wenatchee-Okanogan Cooperative Federation, a full and true copy of which contract was attached to the stipulation marked Exhibit "A" (R. 5). This contract provides that the Wenatchee-Okanogan Cooperative Federation has appointed appellant its "exclusive agent to sell and collect the proceeds from sales of all commercially packed apples and pears which shall come into the possession or control of the Federation as agent for its members." (R. 5.) The appellant is bound by this contract to sell the products mentioned and to obtain the widest possible distribution thereof; to inform the Federation and its members as to marketing conditions; to permit the investigation of its books and records by the Federation or its members; to be responsible for collections upon all sales made by appellant on all shipments where the bill of lading runs to appellant or its order; to handle all traffic matters pertaining to shipments and to attend to the collection of claims against carriers or others, and appellant is bound not to engage in any speculative business on its own behalf. The price at which the Federation's products are sold by

appellant is fixed by the Federation, but appellant's compensation is fixed by the contract at 8c per box for apples and 9c per box for pears. Appellant, in the furtherance of its duties, maintains sales representatives at many points outside the State of Washington, both within the United States and in foreign countries, who not only negotiate sales but who also execute written contracts of sale in appellant's name and in its behalf at their respective places of business outside of the State of Washington.

In the further performance of its duties appellant sends to its representatives outside the State of Washington daily bulletins listing cars of fruit which are for sale and, during the fruit season, expends large sums of money on telegraph, telephone, and cable communications with its extrastate representatives and buyers, all of which are in interstate and foreign commerce, The appellant gives shipping directions to the respective growers and sellers and handles all of the bills of lading on shipments, most of which are actually consigned to appellant at extrastate destinations. Upon arrival of the fruit at its destination appellant attends to the delivery of shipments and the collection of the proceeds therefrom, all of which transactions are carried on in the course of interstate and foreign commerce. The entire gross income of appellant is derived from the interstate and foreign transactions above set

out and is measured directly by the volume, and not the price, of sales made. Appellant's complaint further alleges (R. 3) that the enforcement and collection of the business tax by the appellees is as to this appellant an illegal burden upon interstate and foreign commerce in violation of the Commerce Clause of the Federal Constitution and its provisions prohibiting the state's levying an impost upon exports.

After the hearing of oral arguments and the submission of briefs, the trial court made and filed its memorandum opinion stating that the appellees' demurrer would be sustained "not upon the ground that the plaintiff is not engaged in interstate commerce but upon the ground that it is a domestic corporation and that the tax levied is not a tax upon interstate commerce but upon the privilege of the domestic corporation to exist in this state." (R. 13.) The court thereupon entered its order sustaining appellees' demurrer (R. 14), and the appellant having elected to stand upon its complaint, the court entered judgment dismissing the complaint and allowing the appellant's exception thereto. (R. 14.) Appeal was thereafter in due course taken to the Supreme Court of the State of Washington and briefs having been filed and oral argument heard, the Court called for rehearing before the entire Court sitting en banc. (R. 17.) Thereafter on February

9, 1938, the Court rendered its decision upholding the action of the trial court, and filed its opinion (R. 17) together with the dissenting opinion of a minority of the members of the Court. (R. 24.)

This appeal to the United States Supreme Court was thereupon promptly and in due course taken.

ASSIGNMENT OF ERRORS TO BE URGED HEREIN

1. The Supreme Court of the State of Washington by its judgment erred in failing to hold that the operations of the appellant in selling and distributing throughout foreign states and countries, and collecting the sales price of fruit grown in the State of Washington, form an essential and component part of interstate and foreign commerce. (R. 29.)

2. The Supreme Court of the State of Washington erred in failing to hold that appellant is engaged solely in interstate and foreign commerce. (R. 29.)

3. The Supreme Court of the State of Washington by its judgment erred in holding that the imposition upon and collection from the appellant of the Business and Occupation Tax (Chapter 191, Laws of Washington, 1933, as amended by Chapter 57, Laws of Washington, Extraordinary Session, 1933, and Chapter 180, Laws of Washington, 1935) upon its gross income, is

not a tax or duty laid upon articles exported from the State of Washington in violation of Article 1, Section 9, Clause 5, of the Constitution of the United States. (R. 29.)

4. The Supreme Court of the State of Washington by its judgment erred in holding that the imposition upon and collection from the appellant of the said Business and Occupation Tax upon its gross income, does not constitute an impost or duty on exports in violation of Article I, Section 10, Clause 2 of the Constitution of the United States. (R. 30.)

5. The Supreme Court of the State of Washington by its judgment erred in failing to hold that the imposition of the said Business and Occupation Tax upon appellant's gross income is an unlawful and illegal burden, hindrance, and obstruction upon interstate and foreign commerce in violation of Article I, Section 8 of the Constitution of the United States. (R. 30.)

6. The Supreme Court of the State of Washington by its judgment erred in affirming the judgment of the Superior Court of Thurston County, Washington, denying the injunctive relief against the imposition and collection of the said Business and Occupation Tax upon the appellant's gross income and in dismissing the action filed by the appellant and granting judgment in favor of the appellees. (R. 30.)

7. The Supreme Court of the State of Washington by its judgment erred in failing to grant to appellant the relief sought in this action and in failing to grant judgment in its favor. (R. 30.)

NATURE OF STATUTES INVOLVED

These statutes (Appendix 1) have been before the Supreme Court of the State of Washington and before this Court in several cases. From these decisions the nature and character of the tax is now firmly established. The tax is not a property tax. It is an excise or occupation tax imposed upon the *privilege* of doing business. The tax is imposed for *revenue*, not for *regulation*. The tax is measured by and imposed upon *gross receipts* derived from the doing of business.

State ex rel. Stiner v. Yelle, 174 Wash. 402, 25 Pac. (2d) 91;

Supply Laundry v. Jenner, 178 Wash. 72, 34 Pac. (2d) 363;

Pacific Telephone & Telegraph Co. v. Tax Commission, 183 Wash. 697, 48 Pac. (2d) 938, affirmed 297 U. S. 403;

Fishers Blend Station v. State Tax Commission, 182 Wash. 163, 45 Pac. (2d) 942, reversed 297 U. S. 650;

Paramount v. Henneford, 184 Wash. 376, 51 Pac. (2d) 385; Certiorari denied 298 U. S. 665;

Puget Sound Stevedoring Co. v. Tax Commission, 189 Wash. 131, 63 Pac. (2d) 532, reversed 302 U. S. 90.

SUMMARY OF ARGUMENT

It is argued that the negotiation of sales and the sale of goods to be shipped in commerce among the states and with foreign nations is interstate or foreign commerce; that appellant's principal, if it were to perform the duties it delegates to appellant, would be engaging in interstate and foreign commerce, wherefor appellant is likewise in and a part of such commerce even though an agent or independent contractor; that a tax upon gross receipts is a direct tax upon the acts done by the person sought to be taxed, and, in appellant's case, upon acts done in interstate and foreign commerce; therefore, that the imposition of the tax in question upon appellant's gross receipts is unlawful and in violation of the constitution of the United States, and constitutes an impost or tax upon exports and a direct burden upon commerce among the several states and with foreign nations. The argument is concluded by a discussion of the opinion of the State Supreme Court and the cases relied upon by that Court in reaching its decision.

ARGUMENT

A

THE NEGOTIATION OF SALES AND THE SALE OF GOODS TO BE SHIPPED IN COMMERCE AMONG THE STATES AND WITH FOREIGN NATIONS IS INTERSTATE OR FOREIGN COMMERCE.

The word "Commerce," as used in the Constitution of the United States, is inclusive not only of the actual transportation involved, but also comprehends every species of commercial intercourse among the several states. As stated in the case of *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290, 66 L. Ed. 239, 244,

> "... where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. *American Exp. Co. v. Iowa*, 196 U. S. 133, 143, 49 L. Ed. 417, 422, 25 Sup. Ct. Rep. 182. This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton v. Missouri*, 91 U. S. 275, 280, 23 L. Ed. 347, 349: '"Commerce" is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities'."

In *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160, it was stated at page 303, 1185, that:

> "So far as (the manufacturer) sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce."

The negotiation of sales of goods which are in one state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. *Robbins v. Shelby County Taxing District,* 120 U. S. 489, 30 L. Ed. 694. *Hopkins v. United States,* 171 U. S. 578, 43 L. Ed. 290; and no distinction is made between buying and selling, or between buying for transportation to another state and transporting for sale in another state.

> "Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last." *Dahnke-Walker Milling Co. v. Bondurant, supra,* at page 291, 244.

For further discussion of commerce, see also

United States v. E. C. Knight Co., 156 U. S. 1, 13; 39 L. Ed. 325, 329;

Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 69 L. Ed. 982;

Crenshaw v. Arkansas, 227 U. S. 389, 57 L. Ed. 565;

Adair v. United States, 208 U. S. 161, 52 L. Ed. 436;

Gibbon v. Ogden, 9 Wheat. 1, 6 L. Ed. 23;

Federal Trade Commission v. Pacific States Paper Trade, 273 U. S. 52, 71 L. Ed. 534, and the cases cited therein.

Although the above cases relate principally to commerce among the states we submit that there is no difference between this and foreign commerce so far as the present question is concerned.

Crew Levick Co. v. Pennsylvania, 245 U. S. 292; 62 L. Ed. 295.

B

WHERE APPELLANT'S ACTS, IF DONE BY ITS PRINCIPAL, CONSTITUTE INTERSTATE AND FOREIGN COMMERCE, THEY ARE LIKEWISE SO WHEN DONE BY APPELLANT.

That appellant's principal is engaged in interstate and foreign commerce is not only apparent from the facts, but was granted by the Supreme Court of the State of Washington. (R. 22, 23.) If appellant's principal is engaged in interstate and foreign commerce, and would be exempt from tax if it did precisely that which it employs appellant to do, then regardless of whether appellant is denominated an agent or an independent contractor, appellant is engaged in interstate and foreign commerce.

> "The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. *What is decisive is the nature of the act, not the person of the actor.*" *Puget Sound Stevedoring Co. v. Tax Commission,*

302 U. S. 90, 82 L. Ed. Adv. Op. 64, reversing 189 Wash. 131. (Italics ours.)

Furst v. Brewster, 282 U. S. 493; 75 L. Ed. 478.

Under the allegations of appellant's complaint, as is admitted by appellees' demurrer, and as was granted by the opinion of the Supreme Court of the State of Washington, appellant as agent is, with regard to its Washington State business, engaged solely in the business of creating markets, and selling fruit, for the Wenatchee-Okanogan Cooperative Federation; and all of such fruit, with the exception of a negligible quantity, is sold in commerce among the several states, and with foreign nations. Appellant relieves its principal of the entire task of maintaining out-of-state representation, of negotiating and closing sales for shipment to other states and foreign countries, of executing contracts of sale and of shipment, and of shipping the fruit so sold and collecting the amounts due from buyers.

Under the cases cited herein and the principles established therein, appellant's activities are a component and integral part of interstate and foreign commerce, regardless of whether they are done by it as an agent or an independent contractor.

Real Silk Hosiery Mills v. Portland, supra;

Robbins v. Shelby County Taxing District, supra;

Rearick v. Pennsylvania, 203 U. S. 507, 51 L. Ed. 295;

Crenshaw v. Arkansas, supra;

Crew Levick Co. v. Pennsylvania, supra;

Furst v. Brewster, supra;

McCall v. California, 136 U. S. 104, 34 L. Ed. 391;

Puget Sound Stevedoring Co. v. Tax Commission, supra;

Texas Transport & T. Co. v. New Orleans, 264 U. S. 150, 68 L. Ed. 611.

C

A TAX ON GROSS RECEIPTS IS A DIRECT TAX ON THE ACTS DONE BY APPELLANT.

A tax laid upon gross receipts has long been held to be a direct tax upon the acts from which such receipts are derived. In the dissenting opinion in the case of *Texas Transport & T. Co. v. New Orleans, supra,* it was stated that the burden laid on interstate commerce by a tax is deemed direct

> "where it lays, like a gross receipts tax, a burden upon every transaction in such commerce 'by withholding for the use of the state a part of every dollar received in such transaction' (*Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 297; 62 L. Ed. 295, 299; 38 Sup. Ct. Rep. 126); or where an occupation tax is laid upon one who, like a drummer or delivery agent, is engaged exclusively in inaugur-

ating or completing his own or his employers' transaction in interstate commerce. (*Robbins v. Taxing Dist.*, 120 U. S. 489; 30 L. Ed. 694; 1 Inters. Com. Rep. 45; 7 Sup. Ct. Rep. 592; *Davis v. Virginia*, 236 U. S. 697; 59 L. Ed. 795; 35 Sup. Ct. Rep. 479)."

Of the numerous cases holding this to be the law, we cite the following:

Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326; 30 L. Ed. 1200;

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217; 52 L. Ed. 1031; in which the court, at page 224, 1036, stated that

"In *Philadelphia & S. Mail S. S. Co. v. Pennsylvania, supra*, it was decided that a tax upon gross receipts of a steamship corporation of the state, when such receipts were derived from commerce between the states and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law."

The court thereupon cited several cases subsequent to and in support of the *Philadelphia & S. Mail S. S. Co. v. Pennsylvania.*

See also:

Oklahoma v. Wells, F. & Co., 223 U. S. 298; 56 L. Ed. 445;

Crew Levick Co. v. Pennsylvania, 245 U. S. 292; 62 L. Ed. 295;

United States Glue Co. v. Oak Creek, 247 U. S. 321, 329; 62 L. Ed. 1135, 1141;

Fishers Blend Station v. Tax Commission, 297 U. S. 650, 655; 80 L. Ed. 956, 959;

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90; 82 L. Ed. 64.

The present taxing act, now in question, seeks to levy directly upon appellant's gross receipts from its interstate and foreign business, a tax which is in fact a tax upon every dollar earned by appellant, which is measured directly by the volume of appellant's business, and which is therefore a direct tax upon and regulation of foreign and interstate commerce, and lays an unlawful burden thereupon, in violation of the Constitution of the United States.

D

DISCUSSION OF THE OPINION OF THE COURT BELOW.

The Court below in its opinion (R. 17), said,

> "The appellant may not successfully invoke the rule that, if a contract of sale requires transportation across state lines, the connection is so close as to render the sale itself immune from taxation. In the case at bar we are not dealing with a sale, but with a contract of agency—a contract for services to be rendered by appellant for the fruit growers." (R. 20.)

This Court has said, in the case of *Puget Sound Stevedoring Co. v. Tax Commission, supra*, that

"The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. What is decisive is the nature of the act, not the person of the actor. An independent contractor undertaking to navigate a vessel would have the same protection as a pilot, agreeing to navigate it himself."

In the present case the amount of the tax is governed directly by the volume of sales made by appellant. Regardless of the title given appellant, the tax claimed affects directly the sales made by it, all of which sales are in interstate and foreign commerce.

The court below again said,

"The appellant is a domestic corporation operating, entirely within this state. . . . The tax imposed upon the appellant is not upon imports or exports or interstate or foreign commerce. Appellant is not a necessary factor in such commerce. Appellant renders an independent service — engages in a business within this state. . . ." (R. 20.)

That appellant is a domestic corporation is wholly immaterial in the present controversy. A state may not impose an unconstitutional tax even in the case of a domestic corporation.

Philadelphia & S. Mail S. S. Co. v. Pennsylvania, supra, at 342, 1203;

Ozark Pipe Line v. Monier, 266 U. S. 555, at 567, 69 L. Ed. 439, at 444.

The Court below held that appellant is not a necessary factor in such commerce, but renders an independent service, and is therefore subject to the tax in question. That this is not a controlling fact in the determination of the problem at hand is seen by the *Puget Sound Stevedoring* case, *supra*, wherein an identical holding by the Court below was reversed, by this Court, using the language quoted above. It is likewise true in the instant case, that the services rendered by appellant, no matter by whom they may be rendered, are essential to the marketing of fruit, and without such services appellant's principal could not do business.

The Court below further said:

> "We do not agree with the argument that, as sales of Washington fruit for delivery without the state made directly by appellant's principals are immune from the tax in question, appellant is entitled to the same immunity as it is merely a local agent for growers and associations in this state who have fruit to be sold. If those fruit growers and associations choose to make sales through the medium of an agent or independent contractor, as in the case at bar, the agent's or contractor's activities in this state in making and promoting the sales are subject to state taxation like any other local business." (R. 22.)

Bearing in mind that appellant's sole business is done as agent for the one principal, and that all of the above mentioned sales are in interstate and foreign commerce, whether made by appellant or another, this

quotation illustrates clearly the misunderstanding of the law which prompted the lower court's decision. Again in answer to that court's reasoning, the words of this Court in the *Puget Sound Stevedoring Co.* case are urged:

> *"What is decisive is the nature of the act, not the person of the actor."* (Italics ours.)

As is admitted by appellees, and the Court below, and as is shown clearly by the facts, the acts performed by appellant are in interstate and foreign commerce. Once, therefore, the "independent contractor" theory of the Court below is overcome, there is no basis upon which its opinion can be sustained.

The Court below attempted further to distinguish the present case from the *Puget Sound Stevedoring* case on the ground that stevedoring—the business of loading and unloading—is interstate or foreign commerce, and held, therefore, that decision to be inapplicable to the present case. On the contrary, it is urged herein that the instant case is even stronger than the stevedoring case, for here the appellant operates and has representatives, outside the State of Washington, makes contracts outside of the state, and ships and receives goods outside of the state in its own name. The appellant herein is clearly engaged in interstate and foreign commerce, and all of its acts are a part of that commerce. The rationale of the opinion of the Court

below was not that the acts done by appellant were not such commerce, but rather that since they were performed by appellant as an agent or independent contractor, and regardless of whether the acts were in interstate and foreign commerce, appellant was taxable as a local independent agent or contractor. This reasoning was renounced by the dissenting members of the Court below with the words:

> "The nature of the service is wholly decisive, and whether or not it is rendered by an independent contractor, has nothing whatever to do with the matter." (R. 27.)

The Court below again said:

> "The tax imposed in the case at bar is not directly upon the business itself or upon the volume of business, but upon the amount of commissions earned by the appellant. In principle, the case at bar and *Ficklen v. Shelby County Taxing District*, 145 U. S. 1, 36 L. Ed. 601, 12 S. Ct. 810, are indistinguishable." (R. 23.)

In the *Ficklen* case, the appellant Ficklen had, at the beginning of the year 1887 paid a $50.00 license fee as a general commission merchant, and further gave bond that he would make a return of his gross commissions for the year, in order that a 2½% tax could be levied thereon. He was licensed as a general commission merchant, but at the end of the year, upon discovery that his entire business had been for out-of-state principals, he refused to make a return of his commis-

sions, or to pay the required tax. Ficklen instituted the action to restrain the taxing district from attempting to collect the tax, and alleged a refusal to give him a license for the year 1888. It was held by this Court that having taken out a license in 1887 and given bond to report his commissions and pay the tax upon them, Ficklen could not resort to the courts upon the refusal of the taxing district to issue a new license without payment of the stipulated tax.

Besides holding in the *Ficklen* case that the tax was in effect a property tax, this Court said, at page 21, 606:

> "Although their principals happened during 1887, as to the one party (Ficklen), to be wholly non-resident, and as to the other, largely such, this fact might have been otherwise then and afterwards, as their business was not confined to transactions for non-residents."

And further, at page 22, 606:

> "But here the tax was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business, and complainants voluntarily subjected themselves thereto in order to do a general business."

It is well to point out here that appellant has never taken out a license under the commission merchants law of this state, upon several grounds, one of which being that it is engaged solely in interstate and foreign commerce. This fact leads directly to the distinction

drawn by the Court in the *Ficklen* case, at page 24, 607, where it is said:

> "What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no license therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record."

Further, in the *Ficklen* case it was seen that the amount of the tax was not necessarily proportionate to the amount of commission earned, while in the instant case, the tax is governed entirely by the volume of sales made, and is directly proportionate thereto.

In *Brennan v. City of Titusville,* 153 U. S. 289, 306, 38 L. Ed. 719, 724, this Court said:

> "The case of *Ficklen v. Shelby County Taxing Dist.,* 145 U. S. 1, 4 Inters. Com. Rep. 79, is no departure from the rule of decisions so firmly established by the prior cases. At least, no departure was intended, though as shown by the division in the court and by the dissenting opinion of Mr. Justice Harlan, the case was near the boundary line of the state's power. . . . It was thought by a majority of the court that to release them (Ficklen) from the obligations of their bonds on account of the accidental results of the year's business, was refining too much, and that the plaintiffs who had sought the privilege of engaging in a general business should be bound by the contracts which they had made with the state therefor."

See also *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292, at 296; 62 L. Ed. 295, at 299, and *Texas Transport*

& T. Co. v. New Orleans, 264 U. S. 150, 68 L. Ed. 611. For these reasons it is submitted that *Ficklen v. Shelby County Taxing District, supra,* is not proper authority for the holding of the Court below.

The Court below cited and quoted from the case of *American Manufacturing Co. v. St. Louis,* 250 U. S. 459, 63 L. Ed. 1084, in support of its holding. That case is readily distinguishable from the instant case, as from others of like nature, and such was recognized by this Court expressly in its opinion in that case, at page 465, 1088.

The question before the court in the *American Manufacturing Co.* case was whether the City of St. Louis could levy a license tax upon the appellant for the privilege of manufacturing within that city, where the amount of such tax was determined by the volume of appellant's sales, whether local or interstate. This Court, in holding the tax was upon the privilege of manufacturing, stated, at page 463, 1087;

> "The city might have measured such tax by a percentage upon the value of all goods manufactured, *whether they should ever come to be sold or not,* and have required payment as soon as, or even before, the goods left the factory. In order to mitigate the burden, and also, perhaps to bring merchants and manufacturers upon an equal footing in this regard, it has postponed ascertainment and payment of the tax until the manufacturer can bring the goods into market." (Italics ours.)

The tax in that case was clearly upon the privilege of manufacturing, which is admittedly a purely local function, as opposed to the act of selling:

> "So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the Federal government. *Utah Power & L. Co. v. Pfost*, 286 U. S. 165, 182, 76 L. Ed. 1038, 1047, 52 S. Ct. 548. *Carter v. Carter Coal Co.*, 298 U. S. 238, 303, 80 L. Ed. 1160, 1185.

The Court below relied upon *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290, in holding that the activities of appellant's representatives outside of the State of Washington are not in interstate or foreign commerce. In *Hopkins v. United States* the solicitors outside of the state, it was stated by this Court, at page 601, 299,

> "have no property or goods for sale, and their only duty is to ask or induce those who own the property to agree that when they send it to market for sale they will consign it to the solicitor's principal . . . the solicitor in this case has no goods or samples of goods and negotiates no sales, and merely seeks to exact a promise from the owner of property that when he does wish to sell he will consign to and sell the property through the solicitor's principal. There is no interstate commerce in that business."

In the present case appellant's representatives are not only in daily telegraphic and telephonic communication with appellant with reference to fruit to sell, but they execute and sign, at their out-of-state locations, the contracts of sale and purchase, in appellant's name. It can hardly be said, as was held by the Court below, that these are Washington contracts, or that appellant's representatives are mere solicitors, of the type involved in *Hopkins v. United States, supra.* Appellant's representatives are rather like the drummer who contracts in one state for the sale of goods which are in another, and which are thereafter delivered in the state in which the contract is made.

In further support of this particular holding, the Court below cited *Blumenstock Bros. v. Curtis Publishing Company,* 252 U. S. 436, 64 L. Ed. 649. The connection between that and the instant case is so remote, and the facts are so different, that it need only be said that in that case the contracts in question made by plaintiff, Blumenstock Bros., did not involve any movement of goods or merchandise in interstate commerce and had no relation thereto, and it was so held by this Court.

We conclude this discussion of the opinion of the Court below with the following excerpt from the dissent to its opinion:

"The majority say that the appellant's business is entirely carried on in this state, and that it is in no sense interstate in character. But when it is admitted that the appellant, acting through its representatives, which is the only way a corporation can act, calls on a dealer in New York or London, negotiates a sale of Washington fruit, makes a contract in its own name, and, subsequently, personally attends to the delivery and collection of the proceeds, I need more than I find in the majority opinion, and more than I think can be found anywhere else, to convince me that these acts are performed in the state of Washington, or that the collection of the freight, for example, is an act in any way differing in nature from a transportation company's collection on a C. O. D. shipment." (R. 28.)

CONCLUSION

From the foregoing we respectfully submit that the imposition of the Business and Occupation Tax of the State of Washington upon the operations of appellant violates Section 8, Clause 3, Section 9, Clause 5, and Section 10, Clause 2, of Article I of the Constitution of the United States, in that such imposition lays an unlawful burden upon interstate and foreign commerce.

Respectfully submitted,

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APPENDIX

Chapter 191, Laws of Washington, 1933

AN ACT relating to taxation; imposing taxes upon the privilege of engaging in business activities * * *.

Section 1. For the purpose of this act unless otherwise required by the context:

* * * * * *

(6) The term "gross income" means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without any deduction on account of losses: Provided, The term "gross income" shall not include any payments received on accounts or notes outstanding at the time this act goes into effect.

(7) The word "business" shall include all activities engaged in with the object of gain, benefit or advantage either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of

which sub-activities shall be considered business engaged in taxable in the class in which it falls.

* * * * *

Sec. 2. (2) From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an *annual tax or excise for the privilege of engaging in business activities*. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows: (Italics ours.)

* * * * *

(f) (General section imposing tax of six-tenths of one per cent on businesses *not enumerated, vetoed.*)

* * * * *

Sec. 3. If any person shall engage or continue in any business or the performance of any function for which a *privilege tax* is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington *a license under this act to engage in and to conduct such business or perform such function* for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function. (Italics ours.)

Sec. 5. In computing the amount of any tax * * *, there shall be excepted from gross proceeds of sales or gross income so much thereof as is derived *from sales of tangible personal property shipped or transported to points outside of the State of Washington* * * * or from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States * * *. (Italics ours.)

* * * * *

Sec. 13. * * * No restraining order or injunction shall be granted or issued by any court * * *, except upon the ground that the assessment thereof was in violation of the constitution of the United States or that of the State of Washington.

* * * * *

Sec. 17. Any person against whom a tax shall have been imposed as herein provided may be restrained and enjoined, * * * from engaging and/or continuing in any business for which a privilege tax is required by the provisions of this act, until such tax shall have been paid and/or until such person shall have complied with the provisions of this act.

* * * * *

Sec. 23. It shall be unlawful for any person to fail or refuse to obtain *the license* * * *. Any person violat-

ing any of the provisions of this section shall be guilty of a gross misdemeanor and punishable in the manner provided by law. * * *

Sec. 24. The administration of this act shall be vested in and exercised by the tax commission which shall prescribe forms and rules, etc. * * *

Chapter 57, Laws of Washington Extraordinary Session, 1933

Section 1. That chapter 191 of the Laws of 1933 be, and the same hereby is, amended by adding thereto a new section, to be known as section 2-a, to read as follows:

Section 2-a. (1) From and after the first day of January, 1934, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, professional or otherwise, and from *every person engaging or continuing within this state in any business not specifically taxable* under section 2 of this act, *an annual tax or excise* for the *privilege of engaging* in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent; * * *. (Italics ours.)

Chapter 180, Laws of Washington, 1935

AN ACT relating to revenue and taxation; providing for the levy and collection of a tax or excise upon the act or privilege of engaging in business activities; * * *.

Sec. 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person *a tax for the act or privilege of engaging in business activities.* Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows: (Italics ours.)

* * * * *

(e) Upon every person engaging within this state in any business activity other than or in addition to those enumerated in subsections (a), (b), (c) and (d) above; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one-half of one per cent. This subsection includes, among others, and without limiting the scope hereof, persons engaged in the following businesses (whether or not title to materials used in the performance of such businesses passes to another by accession, confusion or other than by outright sale); repairing, personal, business, professional, mechanical and educational service busi-

nesses; abstract and title, insurance, financial, brokerage, construction contracting and sub-contracting, advertising and hotel businesses.

Sec. 5. For the purpose of this title, unless otherwise required by the context:

* * * * *

(g) The term "gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes or any other expense whatsoever paid or accrued and without any deduction on account of losses;

* * * * *

(m) The word "business" includes all activities engaged in with the object of gain, benefit or advantage to the taxpayer or to another person or class, directly or indirectly;

* * * * *

Sec. 12. In computing tax there may be deducted from the measure of tax the following items:

(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States.

* * * * *

Sec. 187. If any person shall engage in any business or perform any act for which a tax is imposed by this act, he shall * * * apply for and obtain from the commission, upon the payment of a fee of one dollar, *a registration certificate* for each calendar year, or portion thereof. Said registration certificate shall be personal and non-transferable and shall expire on the last day of the calendar year for which issued and shall be renewed annually upon the condition that the taxpayer shall pay the aforesaid registration fee *and the tax accrued to the state under the provisions of this act.* * * * No person shall engage in any business taxable hereunder without being registered in compliance with the provisions of this section.

* * * * *

Sec. 198. * * * No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty imposed by this act, or any part thereof, except upon the ground that the assessment thereof was in violation of the constitution of the United States or that of the State of Washington.

Sec. 202. If any tax, increase or penalty imposed by this act, or any portion of such tax, increase or penalty is not paid within fifteen days * * *, the tax commission shall issue a warrant * * * to the sheriff * * *, commanding him to levy upon and sell the real and/or personal property of the taxpayer found within his county * * *. If any warrant issued under this section is not paid within thirty days after the same has been filed with the clerk of the superior court, the tax commission may by order issued under its official seal, *revoke the certificate of registration* of the taxpayer * * *. (Italics ours.)

* * * * *

Sec. 207. It shall be *unlawful* for any person *to engage in business without* having obtained a *certificate of registration* as provided herein; or to *engage* in business *after* his *certificate* of registration shall have been *revoked* by order of the tax commission; * * * or for the president, vice-president, secretary, treasurer or other officer of any company to carry on the business of any company which has not obtained a certificate of registration or whose certificate of registration has been revoked by order of the tax commission * * *. Any person violating any of the provisions of this section shall be guilty of a gross misdemeanor and punishable in the manner provided by law. * * * (Italics ours.)

Sec. 216. No tax shall be imposed under the provisions of chapter 191, Laws of 1933, as amended by chapter 57, Laws of 1933, Extraordinary Session, with respect to the period beginning May 1, 1935, and ending July 31, 1935, and the provisions of such act shall be deemed amended in conformity herewith. Nothing contained in this section shall affect the liability of any person subject to the provisions of said chapter 191, as amended, for the payment of tax imposed thereunder for any period prior to May 1, 1935, and no action or proceeding for the collection of tax, lien or claim for tax or action involving the validity of tax imposed under the provisions of said act shall be affected hereby and all remedies for the assessment and collection of taxes, penalties and interest under the provisions of said act shall be and remain in effect until such time as all taxes imposed thereunder shall have been paid or collected.

FILE COPY

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1938

No. 75

GWIN, WHITE & PRINCE, INC., Appellant,

v.

HAROLD M. HENNEFORD, THOMAS S. HUNTER and T. M. JEWETT, Constituting the State of Washington Tax Commission, Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

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R. G. SHORT,
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Attorneys for Appellees.

Temple of Justice, Olympia, Washington.

STATE PRINTING PLANT

IN THE

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STATEMENT OF THE CASE

We believe appellant's statement of the case should be somewhat amplified.

In the trial court, appellant was the plaintiff, and appellees, the defendants. To avoid confusion we will

hereafter refer to appellant as "plaintiff," and to appellees as "defendants."

It is alleged in the complaint that plaintiff, a Washington corporation, acting solely as agent for various growers and grower organizations in the states of Washington and Oregon, is in the business of marketing apples and pears produced in Washington and Oregon and in making deliveries of fruit so sold, collecting the sales price and remitting the net balance thereof to said growers and grower organizations.

It is further alleged (Par. IV) that with the exception of occasional sales of small quantities of fruit sometimes made in Washington, all fruit sold by plaintiff is shipped and delivered outside of Washington to non-resident purchasers; (Par. V) that plaintiff has sales representatives at many points outside of Washington, who, on plaintiff's behalf, negotiate said sales and on plaintiff's approval thereof, execute in said points outside of Washington and on plaintiff's behalf, written contracts of sale; that also as part of its business, plaintiff during the fruit season, sends to its said sales representatives daily bulletins listing cars of fruit, some of which are at the time either stored outside of Washington or are already moving in cars in interstate commerce; that in conducting its business and making said sales, plaintiff expends large sums of money in telephone, telegraph and cable communications; that it handles the bills of lading on all shipments made in compliance with the contracts of sale entered into in foreign and extra-state territory, most of said shipments being consigned to plaintiff at extra-state points, and that through its for-

eign and extra-state representatives plaintiff attends to the delivery of said shipments and collects the proceeds therefrom, which are thereafter forwarded to plaintiff at Seattle, all in the course of interstate and foreign commerce.

It is further alleged (Par. VIII) that the defendant, tax commission, has ruled and asserted that under title II, chapter 180, Laws of 1935, plaintiff is liable for the payment of an occupational tax on the business done by it, measured by plaintiff's gross revenue therefrom, and threatens enforcement, and unless restrained will enforce payment as provided by law, to plaintiff's irreparable harm and injury; (Par. IX) that such enforcement of collection of said tax is a violation of the commerce clause, and constitutes a duty on exports in violation of section 10, article 1 of the federal constitution.

Plaintiff then alleges (Par. X) that it has no plain, speedy or adequate remedy at law, and prays for injunctive relief. (R. 1-4.)

Defendants interposed a general demurrer whereupon the following stipulation was entered into:

"It is stipulated * * * that the court may decide this case on the merits on defendants' demurrer together with additional facts herein stipulated.

"It is further stipulated that plaintiff * * * transacts its entire Washington State business under a written contract with the Wenatchee-Okanogan Cooperative Federation which is an organization representing approximately twelve cooperative growers' organizations in the state of Washington, and that a full, true and correct copy of said contract is hereto attached, marked Exhibit A." (R. 4-5.)

By the contract referred to, the Wenatchee-Okanogan Cooperative Federation, a corporation of Wenat-

chee, Washington (therein referred to as the "Federation") appoints plaintiff (therein referred to as "agency") "its exclusive agent to sell and collect the proceeds from sales of all the federation's commercially packed apples and pears." On its part, the federation agrees, among other things (1) to harvest, clean, grade and pack the fruit; (2) "at such times as directed by agency to deliver products free on board cars;" (3) "to ship all cars to points and consignees designated by said agency," and (4) to guarantee, and if required, to prepay all transportation charges. (R. 6-7.)

Plaintiff's obligations under the contract are briefly these: (1) to sell said products f. o. b. at shipping station in transit or delivered; (2) to effect the widest possible distribution of such products and to cultivate and develop domestic and foreign markets; (3) to use its best efforts to shorten the route between producer and consumer by elimination of waste, avoidance of unnecessary middlemen, and education of legitimate wholesale and retail trade; (4) to keep the federation and its members duly informed of market conditions; (5) to permit inspection of plaintiff's books; (6) under certain circumstances to assume responsibility for collection and payment to federation of sales proceeds, less allowance for reasonable claims, but not bank failures or defaults; (7) to assist the federation in all matters pertaining to transportation services, routings, etc.; (8) to cooperate with federation and other representatives of the industry in efforts to create and maintain equitable transportation rates and services; (9) to provide the facilities of its claim department for prosecution of claims for overcharges, loss, or damage. (R. 7-9.)

The contract then provides generally (1) for the general sales policy; (2) that subject to certain conditions the federation and its members are to have the exclusive right to fix the prices of their products; (3) that on consummation of sales, proceeds are to be deposited in the name of plaintiff as trustee; (4) the federation is to pay cost of distant storage and inspection; (5) as to sales made by plaintiff and confirmed by federation, the latter is to hold plaintiff harmless against all expense or loss suffered by plaintiff either by failure to deliver, live up to specifications, or otherwise effect good delivery; (7) plaintiff is to prosecute all claims against carriers but federation to pay costs thereof; (8) plaintiff is to endeavor to audit carriers' expense bills in all cases where legal liability may attach to federation; (9) plaintiff is to pay for all telegraph or telephone messages between plaintiff and federation; (10) federation is to pay plaintiff same amount per box of fruit whether sold by plaintiff or through other channels.

The compensation for plaintiff's services was fixed at 8 cents a box for apples and 10 cents a box for pears. (R. 9-12.)

The court entered its order sustaining defendants' demurrer to the complaint (R. 14), and thereafter, it having been further stipulated that the state made no claim to a tax on plaintiff's Oregon business, and the plaintiff having elected to stand on its complaint as supplemented by the stipulated facts, the court dismissed the suit. (R. 14.)

On appeal, the judgment of the trial court was affirmed. (R. 28.) *Gwin, White & Prince Inc. v. Henneford*, 193 Wash. 451. Plaintiff has appealed to this court.

ARGUMENT

The exaction of the Washington business tax on plaintiff's business activities in Washington does not offend the commerce clause.

The validity of the offending exaction depends on the state's power to tax businesses conducted within its borders, and the extent to which this power is limited by the commerce clause.

Of course, business transactions totally unconnected with any interstate or foreign transportation, are subject to state taxation. Moreover, even if a given business activity be connected with a prior or subsequent interstate transportation of the subject of the transaction, the commerce clause still does not forbid its non-discriminatory local taxation unless the connection is so close that the exaction of the tax can be said to constitute a direct burden, as distinguished from a remote, indirect or incidental, burden on interstate commerce.

The controlling principles determinative of when a non-discriminatory state gross receipts tax constitutes a forbidden direct burden on interstate commerce, and when a permissive indirect or incidental burden were clearly stated and applied in the recent case of *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, upholding a state tax on the business of publishing newspapers or magazines of interstate distribution measured by 2% of the gross receipts from the sale of advertising including contracts with ultra-state advertisers, which contracts involved interstate transmission of cuts, mats, information, copy, etc., and also payment through interstate facilities. Said the court in part (pp. 253-261):

"Appellants insist here, as they did in the state courts, that the sums earned under the advertising con-

tracts are immune from the tax because the contracts are entered into by transactions across state lines and result in the like transmission of advertising materials by advertisers to appellants, and also because performance involves the mailing or other distribution of appellants' magazines to points without the state.

"That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of congressional action, unless the performance is within its protection, is a proposition no longer open to question. * * * Hence it is unnecessary to consider the impact of the tax upon the advertising contracts except as it affects their performance, presently to be discussed. Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business. * * * (citing cases). * * * Here the tax which is laid on the compensation received under the contract is not forbidden either because the contract, apart from its performance, is within the protection of the commerce clause, or because as an incident preliminary to printing and publishing the advertisements the advertisers send cuts, copy and the like to appellants.

"We turn to the other and more vexed question, whether the tax is invalid because the performance of the contract, for which the compensation is paid, involves to some extent the distribution, interstate, of some copies of the magazine containing the advertisments. * * *

"It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way,' * * * and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce. * * * Net earnings from interstate commerce are subject to income tax, *United States Glue Co. v. Oak Creek*, 247 U. S. 321, * * *.

"All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. * * * The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 523.

* * * * * * * * *

"In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax. This court has sustained a similar tax said to be on the privilege of manufacturing, measured by the total gross receipts from sales of the manufactured goods both intrastate and interstate. *American Manufacturing Co. v. St. Louis*, (250 U. S. 459) *supra*, 462. The actual sales prices which measured the tax were taken to be no more than the measure of the value of the goods manufactured, and so an appropriate measure of the value of the privilege, the taxation of which was deferred until the goods were sold. *Ficklen v. Shelby County Taxing Dist.*, (145 U. S. 1) *supra*, sustained a license tax measured by a percentage of the gross annual commissions received by brokers engaged in negotiating sales within for sellers without the state.

"Viewed only as authority, *American Manufacturing Co. v. St. Louis, supra*, would seem decisive of the pres-

ent case. But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business.

"As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. Cf. *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U. S. 90, 94. * * * Experience has taught that the opposing demands that the commerce shall bear its share of local taxation, and that it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce, are not capable of reconciliation by resort to the syllogism. Practical rather than logical distinctions must be sought.

* * * * * * * *

"But there is an added reason why we think the tax is not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate communication or transportation of goods. So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine. As already noted, receipts from subscriptions are not included in the measure of the tax. It is not measured by the extent of the circulation of the magazine interstate. All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are beyond any control and taxing power which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers. The dangers which

may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent."

And compare *Coverdale v. Pipe Line Co.*, 303 U. S. 604, 612.

In the present case, plaintiff can be taxed in no other state by reason of its Washington activities in acting as the federation's sales agent. And likewise, as will be shown later, the activities of plaintiff's ultra-state representatives can be taxed only by the states where such activities occur.

In *Adams Mfg. Co. v. Storen*, 304 U. S. 307, it was held that the Indiana gross income tax act imposing a tax upon gross receipts from commerce, could not constitutionally be applied to the gross receipts derived by an Indiana corporation from sales in other states of goods manufactured by it in Indiana.

Had the state sought to impose a tax measured by the gross receipts derived by Washington apple growers from their sales in other states and foreign countries of fruit grown in Washington, such a tax would have been void under the *Storen* decision.

But that is not the situation here. The tax is imposed, not on the Washington growers, but on such growers' agent. The tax is measured, not by the sales price of the fruit, but by the compensation paid plaintiff for its local services as agent.

The Indiana exaction was not, as here, a business tax, but a "privilege tax upon the receipt of gross income." Said the court (304 U. S. 310):

"Nor is it for the transaction of business, since in many instances it hits the receipt of income by one who conducts no business."

In condemning the offending tax, the court said further in the *Storen* case (304 U. S. 311-314):

"Appellant's sales to customers in other states and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent. on every dollar received from these sales.

"The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Sec. 8 of the Constitution.

* * * * * * * *

"So far as the sale price of the goods sold in interstate commerce includes compensation for a purely intrastate activity, the manufacture of the goods sold, it may be reached for local taxation by a tax on the privilege of manufacturing, measured by the value of the goods manufactured, or by other permissible forms of levy upon the intrastate transaction. It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate."

As earlier noted, the chief objection to the Indiana tax—potential multiple taxation—is not present here. It is only plaintiff's local activities in Washington that the state is seeking to tax.

Services of broker or agent in making interstate sales are not tax-exempt.

It will bear repeating that here, we are not dealing with a sale, but with a contract of agency—a contract for services to be rendered by plaintiff for the Cooperative Federation.

The restrictioins on state taxation of imports from foreign nations are at least as great, if not greater than those applied to articles of interstate commerce. Thus, an importer is said to be entitled to his first sale in the original package, unrestricted by any license or other state taxes (*Brown v. Maryland*, 12 Wheat. 419; *Anglo-Chilean Nitrates Sales Corp. v. Alabama*, 288 U. S. 218, 226-7).

Yet even in the case of exports, the supreme court early recognized the distinction between sales by the owner and sales by an agent. In *Hopkins v. U. S.*, 171 U. S. 578, 595, the court thus reviewed its early ruling:

"In *Brown v. Maryland*, 12 Wheat. 419, Chief Justice Marshall, while maintaining the right of an importer to sell his article in the original package, free from any tax, recognized the distinction between the importer selling the article himself and employing an auctioneer to do it for him, and he said that in the latter case the importer could not object to paying for such services as for any other, and that the right to sell might very well be annexed to importation without annexing to it also the privilege of using auctioneers, and thus to make the sale in a peculiar way. In such case a tax upon the auctioneer's license would be valid."

In *Hopkins v. U. S.*, 171 U. S. 578, the court held activities of a commission merchant similar to those of the plaintiff here, not to constitute interstate commerce. The facts sufficiently appear from the following generous excerpts (pp. 587 *et seq.*):

"We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affect interstate commerce at all, does so only in an indirect and incidental manner?

"* * * The business of defendants is primarily and substantially the buying and selling, in their character as commission merchants, at the stock yards in Kansas City, live stock which has been consigned to some of them for the purpose of sale, and the rendering of an account of the proceeds arising therefrom. The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the State from other States or from the Territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City stock yards, is not the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city.

* * * * * * * *

"It is urged that they are active promoters of the business of selling cattle upon consignment from their owners in other States, and that in order to secure the business the defendants send their agents into other States to the owners of the cattle to solicit the business from them; that the defendants also lend money to the cattle owners and take back mortgages upon the cattle as security for the loan; that they make advances of a portion of the purchase price of the cattle to be sold, by means of the payment of drafts drawn upon them by the shippers of the cattle in another State at the time of the shipment. All these things, it is said, constitute intercourse and traffic between the citizens of different States, and hence the by-law in question operates upon and affects commerce between the States.

* * * * * * * * *

"* * * That business is not altered in character because of the various things done by defendants for

the cattle owner in order to secure it. The competition among the defendants and others who may be engaged in it, to obtain the business, results in their sending outside the city to cattle owners, to urge them by distinct and various inducements to send their cattle to one of the defendants to sell for them. In this view it is immaterial over how many States the defendants may themselves or by their agents travel in order to thereby secure the business. They do not purchase the cattle themselves; they do not transport them. They receive them at Kansas City, and the complaint made is in regard to the agreements for charges for the services at that point in selling the cattle for the owner. Thus everything at last centers at the market at Kansas City, and the charges are for services there, and there only, performed.

"The selling of an article at its destination, which has been sent from another State, while it is one of the forms of and which itself constitutes interstate trade or commerce, while charges or commission based upon services performed for the owner in effecting the sale of the cattle, is not directly connected with, as forming part of, interstate commerce, although the cattle may have come from another State. Charges for services of this nature do not immediately touch or act upon nor do they directly affect the subject of the transportation. Indirectly and as an incident, they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by a purchaser, but they are not charges which are directly laid upon the article in the course of transportation, and which are charges upon the commerce itself; they are charges for the facilities given or provided the owner in the course of the movement from the home *situs* of the article to the place and point where it is sold."

The rule deducible from *Hopkins v. United States*, is, we submit, that even where a sale of goods by the owner would constitute interstate commerce within the protection of the commerce clause, where a sale of the same character is made by a broker or commission merchant, the services performed by the agent in connection with such sale are not to be deemed so connected with the interstate transaction as to make them a part of inter-

state commerce, and at most the effect, if any, of such services upon interstate commerce is but remote, indirect and incidental. This being true, such agent's activities are within the state's legitimate taxing power.

A non-discriminatory state tax which only indirectly or remotely burdens interstate commerce is not obnoxious to the commerce clause.

Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290, 294;

Western Cartridge Co. v. Emmerson, 281 U. S. 511, 514;

Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249, 267-8;

Southern Gas Corp. v. Alabama, 301 U. S. 148, 157.

It is true, of course, that in more recent cases this court, under the "flow of commerce" doctrine, has upheld federal legislation forbidding illegal combinations among purchasers of live stock at the great stock yard centers (*Swift and Co. v. U. S.*, 196 U. S. 375; *Stafford v. Wallace*, 258 U. S. 495), but in so doing, it distinguished, but did not disturb, its prior ruling in the *Hopkins* case. To quote:

"So, again, the line is distinct between this case and *Hopkins v. United States*, 171 U. S. 578. All that was decided there was that the local business of commission merchants was not commerce among the States, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales. Therefore, there again the effects of the combination of brokers upon the commerce was only indirect and not within the act. * * *" (196 U. S. 397; 258 U. S. 524.)

By way of explanation of the *Ficklen* case upon which the state court largely rests it decision, may we say

that in *Robbins v. Shelby County Taxing District*, 120 U. S. 489, it had been earlier held that a Tennessee statute imposing a license tax of $25 per month on all drummers not having a regular licensed place of business in the taxing district was violative of the commerce clause as applied to persons soliciting the sale of goods on behalf of firms doing business in another state. Three justices dissented. In the later case of *Ficklen v. Shelby County Taxing District*, 145 U. S. 1, 21, the court said as to a license tax measured by gross commissions imposed on factors and brokers buying or selling on commission, as applied to a commission merchant who negotiated sales on behalf of principals residing in other states with respect to goods located in other states:

"In the case of Robbins the tax was held, in effect, not to be a tax on Robbins, but on his principals; while here the tax was clearly levied upon complainants in respect of the general commission business they conducted and their property engaged therein, or their profits realized therefrom.

"No doubt can be entertained of the right of a state legislature to tax trades, professions and occupations, in the absence of inhibition in the state constitution in that regard and where a resident citizen engages in general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution.

"* * * This tax is not on the goods, or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce." (p. 24.)

Record fails to show that offending tax imposed on extra-territorial activities.

One reason suggested by the state court dissenting justices for condemning the Washington business tax as applied to plaintiff was that a part of appellant's business activities were carried on through its representatives in states other than Washington. (R. 28.)

In this connection, may we call attention to the following allegation of the complaint:

"That as a part of plaintiff's business it has sales representatives in very many points outside of the State of Washington who, on behalf of the plaintiff, negotiate said sales and on approval of the plaintiff of the same execute in said points outside of the State of Washington and on behalf of the plaintiff written contracts of sale." (R.2.)

While this averment is admitted by the demurrer, there is no allegation or showing that defendants threaten the exaction of the tax with respect to any part of the business handled by those non-resident sales representatives.

The state business or occupational tax is measured by ½ of 1% of "the gross income of the business engaged in within this state." (Laws of Wash. of 1935, ch. 180, sec. 4(f).)

A deduction is allowed of,—

"Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States"; (sec. 12(f).)

Plaintiff's gross income as sales agent for the Cooperative Federation is derived from the following paragraph of the agency agreement:

"In consideration of the services to be rendered by Agency according to the provisions above set forth, Federation shall pay to Agency, and the latter is authorized to deduct from the proceeds of sales made, the following compensation, viz.:

"Apples in standard boxes, eight cents per box

"Pears in standard boxes, ten cents per box.

"Provided further that all cars sold *to which attach brokerage*, diversion demurrage, icing, storage or other charges not properly payable by the purchaser, or that in the event of cars being broken up and sold in less-carload parcels at destination; cars being exported or cars sold delivered, all transportation, icing, selling, auction, dock, carting, seaboard forwarding and other actual out-of-pocket expenses shall be first deducted from the proceeds of any such sale and no part of such expense shall be borne by Agency out of its service revenues." (R. 12.) (Emphasis supplied.)

Unquestionably plaintiff's ultra-state sales representatives are paid for their services, yet in view of the above proviso, may it not be fairly assumed that whenever such brokerage is payable by the seller, it is paid by the principal in addition to plaintiff's agreed compensation of so much per box?

But however this may be, the theory of plaintiff's complaint is that all of its activities constitute interstate commerce as to which no tax whatever may be imposed. No claim is made that defendants refuse to allow a deduction with respect to that portion of plaintiff's gross income, if any, earned outside the state.

Moreover, the vice of a state tax on an extra-territorial activity would be its contravention of the due process, and not of the commerce clause.

61 C. J., p. 160, note 82, p. 163, note 34.

Neither in its complaint nor elsewhere does plaintiff invoke the protection of the due process clause, its

only claim being that the exaction of the offending tax would offend the commerce clause and the provisions of article I, section 10, forbidding state taxation of exports. (R. 3-4.)

It is, of course, well settled that "if a federal question is raised in the state court, a party bringing the case to the supreme court of the United States cannot raise in that court another federal question not raised below."

Vol. 1, Encyc. of U. S. Sup. Crt. Rep. 632, note 19;
Dewey v. Des Moines, 173 U. S. 193, 198;
Indiana Power Co. v. Elkhart Power Co., 187 U. S. 636;
Cox v. Texas, 202 U. S. 446.

Thus, three sufficient reasons suggest themselves why appellant cannot here successfully assail the offending exaction as extra-territorial taxation:

(1) There is no showing that any of plaintiff's gross income by which the tax is measured, is earned outside the state;

(2) There is no showing of a rejection by the Washington administrative officers of any claimed deduction by reason of plaintiff's extra-territorial business activities, if any;

(3) Extra-territorial taxation violates, not the commerce clause but the due process clause, a federal constitutioinal provision whose protection was not sought in the lower court.

Solicitation of sales by plaintiff's ultra-state representatives, would not make plaintiff's own activities non-taxable interstate commerce.

Defendants, as we have seen, assert no right to impose the challenged business tax on the activities of plain-

tiff's outside representatives in making, or assisting in making fruit sales. Plaintiff's own business is taxable only by the state where conducted. Likewise, its agents' business is taxable only by the state wherein performed. Neither's activities are interstate, merely because involving interstate shipments of commodities.

Nor does the mere solicitation of sales by these outside representatives, transform plaintiff's activities into tax-free interstate commerce. In *Hopkins v. U. S.*, 171 U. S. 578, 601, the court said with respect to the effect of a commission merchant's agents soliciting orders in other states:

"We do not think it can be properly said that the agents of the defendants whom they send out to solicit the various owners of stock to consign the cattle to one of the defendants for sale are thereby themselves engaged in interstate commerce. They are simply soliciting the various stock owners to consign the stock owned by them to particular defendants at Kansas City, and until the arrival of the stock at that point and the delivery by the transportation company no duties of an interstate commerce nature arise to be performed by the defendants. As the business they do is not interstate commerce, the business of their agents in soliciting others to give them such business is not itself interstate commerce."

It could hardly be said that the solicitation of sales in other states through the medium of local sales-representatives would amount to interstate commerce any more than advertising the merits of the products handled by plaintiff through the medium of newspaper advertising; yet in *Blumenstock Bros. v. Curtis Pub. Co.*, 252 U. S. 436, it was held that a business conducted by an advertising agency of placing, by contracts with publishers, advertisements for manufacturers and merchants, in 'maga-

zines, which were published and distributed through the United States, was not interstate commerce.

And compare *Western Live Stock v. Bureau of Revenue* (303 U. S. 250), *supra*.

Assuming for the sake of argument that sales of fruit for ultra-state delivery, if made directly by plaintiff's principals, would be immune from unapportioned state taxation, yet we insist that where such principals chose to make such sales through the medium of an independent contractor, the latter's activities in Washington in making and promoting such sales are subject to state taxation like any other local business.

For the reasons urged, we respectfully submit that the judgment of the state supreme court should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 75.—October Term, 1938.

Gwin, White & Prince, Inc., Appellant,
vs.
Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Constituting the State of Washington Tax Commission.

Appeal from the Supreme Court of the State of Washington.

[January 3, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

This appeal raises the single question whether a Washington tax measured by the gross receipts of appellant from its business of marketing fruit shipped from Washington to the places of sale in various states and in foreign countries is a burden on interstate and foreign commerce prohibited by the commerce clause of the Federal Constitution.

Appellant, a Washington corporation licensed to do business there, brought this suit in the state Superior Court to restrain appellees, comprising the State Tax Commission, from collecting the "business activities" tax laid by Chapter 180 of Washington Laws of 1935, amending Chapter 191 of Washington Laws of 1933, on the ground that it infringes the commerce clause. By stipulation after demurrer to the bill of complaint the cause was tried and decided on the merits, upon facts stated in the complaint and certain others specified in the stipulation. Judgment of the trial court for appellees was affirmed by the Supreme Court of Washington, 193 Wash. 451, and the case comes here on appeal under § 237(a) of the Judicial Code as amended, 28 U. S. C. § 344.

Sections 4(e), 5(g), (m) of Tit. II, c. 180 of Washington Laws of 1935 lay "a tax for the act or privilege of engaging in business activities" upon every person (including corporations) "engaging within this state in any business activity," with exceptions not now material, at the rate of one-half of 1% of the "gross income of the business." As the record discloses, appellant has a place of business in the state of Washington from which it carries on its operations in

marketing, in other states and foreign countries, apples and pears grown in Washington and Oregon. Its entire business is that of marketing agent for fruit growers and growers' cooperative organizations in those states. As such it makes sales and deliveries of the fruit in other states and in foreign countries, collects the sales prices and remits the proceeds to its principals after deducting transportation charges, certain expense allowances and its own compensation. In the course of the business the fruit is shipped from the states of origin—approximately 25% from Oregon—to other states and foreign countries, sometimes directly to the purchasers, but more often it is consigned to appellant at extra-state points from which it is diverted by appellant to purchasers who buy the fruit while in transit, or where it is stored pending sale. Representatives of appellant at numerous points without the state negotiate sales of the fruit on behalf of appellant and on its approval execute written contracts of sale, effect delivery of the shipments to purchasers, collect the purchase price and remit it to appellant in Washington, where it is accounted for to the shippers. In conducting the business appellant sends to its representatives without the state daily bulletins listing the fruit, some of which is in transit interstate and some of which has already been placed in storage without the state, and it expends large amounts for communications by telephone, telegraph and cable between itself in Washington and its representatives outside the state.

The entire Washington business is carried on by appellant under contract with an incorporated federation of twelve state cooperative growers' organizations. By this contract appellant is given exclusive authority to sell all apples and pears coming into the possession and control of the federation as agent for its members and to collect the proceeds of sale. Appellant undertakes to sell these products at prices fixed by the federation, to obtain their widest possible distribution, to attend to all traffic matters pertaining to shipment and transportation of the fruit, to effect delivery to purchasers and to collect and remit the sales prices. The stipulated compensation for the entire service is at the rate of 8 cents a box for apples sold and 10 cents a box for pears. According to the bill of complaint appellees assert that appellant is subject to the tax upon its entire gross revenue from the business, and they threaten to collect the tax and to impose penalties for its nonpayment. But on the trial it was stipulated that "the state makes

no claim" to the tax upon appellant's Oregon business, and we treat the decision and decree of the state court as concerned only with the validity of the tax measured by the amount of fruit shipped from Washington.

The Supreme Court of Washington, conceding that the shipment of the fruit from the state of origin to points outside, and its sale there, involve interstate commerce, held nevertheless that appellant's activities in Washington in promoting the commerce were a local business, subject to state taxation as is other business carried on in the state, and it sustained the present levy, against attack under the commerce clause, as a tax upon those activities, citing *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, and *American Manufacturing Co.* v. *St. Louis*, 250 U. S. 459.

We need not stop to consider which, if any, of appellant's activities in carrying on its business are in themselves transportation of the fruit in interstate or foreign commerce. For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that commerce. Such services are within the protection of the commerce clause, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Real Silk Mills* v. *Portland*, 268 U. S. 325; and the only question is whether the taxation of appellant's gross receipts derived from them is such an interference with interstate commerce as to bring the tax within the constitutional prohibition.

While appellant is engaged in business within the state, and the state courts have sustained the tax as laid on its activities there, the interstate commerce service which it renders and for which the taxed compensation is paid is not wholly performed within the state. A substantial part of it is outside the state where sales are negotiated and written contracts of sale are executed, and where deliveries and collections are made. Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume.

The constitutional effect of a tax upon gross receipts derived from participation in interstate commerce and measured by the amount or extent of the commerce itself has been so recently and fully considered by this Court that it is unnecessary now to elaborate the applicable principles. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307; cf. *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604.

It has often been recognized that "even interstate business must pay its way" by bearing its share of local tax burdens, *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252, 259, and that in consequence not every local tax laid upon gross receipts derived from participation in interstate commerce is forbidden. See *Western Live Stock* v. *Bureau of Revenue*, *supra*, 254 *et seq.*, and cases cited. But it is enough for present purposes that under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state, see *Wisconsin & M. Ry. Co.* v. *Powers*, 191 U. S. 379; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450; *United States Express Co.* v. *Minnesota*, 223 U. S. 335; cf. *Ficklen* v. *Shelby County Taxing District*, *supra*; *American Manufacturing Co.* v. *St. Louis*, *supra*, burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject.

Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate

commerce is being done, the risk of a multiple burden to which local commerce is not exposed. *Adams Manufacturing Co.* v. *Storen, supra,* 310, 311; cf. *Fargo* v. *Michigan,* 121 U. S. 230; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Galveston, H. and S. A. Ry. Co.* v. *Texas,* 210 U. S. 217, 225, 227; *Meyer* v. *Wells Fargo & Co.,* 223 U. S. 298; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Fisher's Blend Station* v. *State Tax Commission,* 297 U. S. 650; see *Western Live Stock* v. *Bureau of Revenue, supra,* 260. Such a multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden.

Ficklen v. *Shelby County Taxing District, supra,* which the Washington Supreme Court thought sustained its decision, upheld a state license tax imposed upon the privilege of doing a brokerage business within the state and measured by the gross receipts of commissions from sales of merchandise shipped into the state for delivery after the sales were made. Although the tax, measured by gross receipts, to some extent burdened the commerce, it was held that the burden did not infringe the commerce clause. Since it was apportioned exactly to the activities taxed, all of which were intrastate, the tax was fairly measured by the value of the local privilege or franchise. *N. Y., L. E. & W. R. Co.* v. *Pennsylvania,* 158 U. S. 431; *American Manufacturing Co.* v. *St. Louis, supra; Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co., supra.* Neither the tax in the *Ficklen* case nor that upheld in *American Manufacturing Co.* v. *St. Louis, supra,* was open to the objection directed here to the present tax and sustained in *Adams Manufacturing Co.* v. *Storen, supra,* 311, that the tax is measured by gross receipts from activities in interstate commerce conducted both within and without the taxing state and that the exaction is of such a character that if lawful it might be laid to the fullest extent by the states in which the merchandise is sold as well as by those from which it is shipped. See *Western Live Stock* v. *Bureau of Revenue, supra,* 260.

For more than a century, since *Brown* v. *Maryland,* 12 Wheat. 419, 445, it has been recognized that under the commerce clause,

Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. *Webber* v. *Virginia*, 103 U. S. 344; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Robbins* v. *Shelby County Taxing District*, *supra*; *Leloup* v. *Mobile*, 127 U. S. 640; *Brennan* v. *Titusville*, 153 U. S. 289; *International Text Book Co.* v. *Pigg*, 217 U. S. 91; *Fisher's Blend Station* v. *State Tax Commission*, *supra*; *Adams Manufacturing Co.* v. *Storen*, *supra*. For half a century, following the decision in *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, it has not been doubted that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed. During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established. Instead, it has left them undisturbed, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. Meanwhile Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has been left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and to other forms of taxation not destructive of it. See *Western Live Stock* v. *Bureau of Revenue*, *supra*, 254, *et seq.*, and cases cited.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 75.—October Term, 1938.

Gwin, White & Prince, Inc., Appellant,
vs
Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Constituting the State of Washington Tax Commission.
} Appeal from the Supreme Court of the State of Washington.

[January 3, 1939.]

Mr. Justice Butler.

Mr. Justice McReynolds and I concur in the result.

Appellant is engaged exclusively in interstate commerce, a part of which is carried on in the State of Washington. For the privilege of doing that business the state statute purports to tax its gross earnings at the rate of one-half of one per cent. The exaction is plainly repugnant to the commerce clause. *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326. *Galveston, H. & S. A. Ry. Co.* v. *Texas*, 210 U. S. 298, 300. *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298, 300. *New Jersey Telephone Co.* v. *Tax Board*, 280 U. S. 338, 346. *Fisher's Blend Station* v. *Tax Comm'n*, 297 U. S. 650, 655-656. *Puget Sound Co.* v. *Tax Comm'n*, 302 U. S. 90, 94. See *Matson Nav. Co.* v. *State Board*, 297 U. S. 441, 444. Reversal appropriately may be based on citation of these decisions without more.

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[January 3, 1939.]

Mr. Justice BLACK, dissenting.

"Equality is the theme that runs through all the sections of the statute"[1] of the State of Washington here considered. The statute imposes a general, non-discriminatory tax—measured by gross receipts—upon all businesses operating in that State. The intended equality of the statute will become unequality by the judgment of this Court here, because appellant and all other businesses in Washington that receive income for selling Washington products in that and other States, are exempted from the tax. Appellant is exempted from past, present and future payments of this tax. Not so, however, as to past, present, or future payments by Washington businesses selling only to citizens of that State. They must bear the entire burden of the tax. Thus the judgment here, framed to prevent conjectured future, possible—not present and actual—discrimination against interstate commerce, makes of this statute with equality as its theme, an instrument of discrimination against Washington intra-state businesses. Appellant, a Washington agent or broker selling Washington products in that State and elsewhere, can now do so freed from this business tax. Washington agents and brokers selling the same products to Washington citizens (and all other local businesses) must pay. Washington's intra-state commerce thus will "pay its way,"[2] interstate commerce need not.

In 1933, Washington's system of taxation failed to supply adequate revenue to support activities essential to the welfare of its people. Mounting delinquencies due to burdensome taxes on prop-

[1] Henneford v. Silas Mason Co., 300 U. S. 577, 583.
[2] Cf. Postal Tel.-Cable Co. v. Richmond, 249 U. S. 252, 259.

erty led the State legislature to conclude that property taxes had to be reduced. This reduction was made. Then, forced to seek new sources of revenue,[3] the State turned—as did many other States faced with similar needs[4]—to a general, non-discriminatory excise tax upon business carried on in Washington, measured by gross receipts. This general and non-discriminatory tax enabled "the common schools of the state . . . to operate the full school term."[5] While those engaged in interstate businesses have enjoyed the property tax reduction in common with all Washington businesses, the exemption from taxation here granted appellant forces intra-state businesses to bear the entire burden of the excise that replaced the repealed property taxes.[6] Only intra-state business is required to contribute under this excise to the support of the State government that affords protection to both interstate and local business.[7]

Appellant, a Washington corporation, serves—under a contract made in Washington—as sales agent for Washington apple growers. Its agents sell these Washington-grown apples in Washington and other States. The Washington excise tax is measured by appellant's gross income—received in Washington—and earned solely by selling apples grown in and shipped from that State.[8]

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[3] Fifth Biennial Report, Tax Commission of Washington; "The Sales Tax in the American States," Haig & Shoup (1934), p. 309 *et seq.*

[4] At least eleven States—most of them recently—have imposed gross income or gross sales taxes upon the privilege of doing business within their respective borders. See, "Tax Systems of the World," 7th Ed. (CCH), pp. 153 to 156. While these laws vary in application, several may be generally characterized as similar to the Washington tax. See, "State Law Index" No. 5, p. 673 (Legislative Reference Service, Library of Congress); Fifth Biennial Report, *supra*; dissent, Adams Manufacturing Co. v. Storen, 304 U. S. 307, 317, Footnote 4.

[5] Fifth Biennial Report, *supra*, p. 8.

[6] Cf. Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453, 454; United States Express Co. v. Minnesota, 223 U. S. 335, 345, 347.

[7] Woodruff v. Parham, 8 Wall. 123, 137.

[8] While about 25% of appellant's business relates to the sale of Oregon-grown apples, the State of Washington made no contention that it could under its statute impose a tax upon appellant's receipts from the sale of Oregon-grown apples. The judgment of the State court from which appeal was taken expressly states: "the court . . . considered . . . the stipulation between the parties that the State makes no claim to the tax upon the Oregon business of . . . [appellant] even though it clears through . . . [appellant's] Seattle office," and was "of the opinion that the business of . . . [appellant], *originating in the State of Washington is taxable.*" (Italics supplied.) In affirming this judgment the Supreme Court of Washington pointed out that appellant was denying "the state tax commission's claim of a tax liability on the total commission appellant receives *from the growers for Washington-grown food sold and shipped to parts within and without this State* . . ." (Italics supplied.)

No other State in which appellant's agents perform sales services has imposed a similar tax upon appellant measured by any part of its gross receipts. Such an eventuality—if it should occur—is given the title of "multiple taxation." And such conjectured "multiple taxation" would be—it is said—a violation of that Clause of the Constitution which gives Congress power to regulate commerce among the States. Thus far, Congress has not deemed it necessary to prohibit the States from levying taxes measured by gross receipts from interstate commerce. While there are strong logical grounds upon which this Court has based its invalidation of State laws actually imposing unjust, unfair, and discriminatory burdens against interstate commerce as such,[9] the same grounds do not support a judicial regulation designed to protect commerce from validly enacted non-discriminatory State taxes which do not—but may sometime—prove burdensome. With reference to the possible invalidity of another phase of this same Washington tax program by reason of conjectured future taxes of other States, this Court has said:[10]

"A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination."

So here, if national regulation to prevent "multiple taxation" is within the constitutional power of this Court, it would seem to be time enough to consider it when appellant or some other taxpayer is actually subjected to "multiple taxation."

Unless we presuppose that the conjectured tax on appellant's gross income by another State would be valid, appellant has not even shown a hypothetical possibility of injury. Certainly, Washington's law, enjoying a strong presumption of constitutionality, would not be invalidated because of apprehension that another State might lay a tax on appellant's income which is invalid and unenforceable. Any other State's tax on appellant which directly discriminates against interstate commerce, could not (together with

[9] Welton *v.* State of Mo., 91 U. S. 275; Walling *v.* Mich., 116 U. S. 446; Darnell & Son *v.* Memphis, 208 U. S. 113; cf. Phila. Steamship Co. *v.* Penn., 122 U. S. 326, 342, 344-5.

[10] Henneford *v.* Silas Mason Co., *supra*, at 587.

Washington's tax) create a "multiple burden." This is so, because such a discriminatory tax law, standing alone, would be held to violate the Commerce Clause.[11] Every State has the right to utilize gross receipts as the measure of taxes which it has the power to impose.[12] Washington—it is admitted—had the power to tax appellant save for the possibility of "multiple taxation." Since "multiple taxation" can only result if another State passes a valid, non-discriminatory tax law, two non-discriminatory State laws when combined become invalid and discriminatory under the Commerce Clause, as a result of the judgment here. This is the consequence of departing from the sound position that State laws are not invalid under the Commerce Clause unless they actually discriminate against interstate commerce or conflict with a regulation enacted by Congress.

Appellant is here specifically exempted from Washington's non-discriminatory "tax for the act or privilege of engaging in business activities" in Washington because of conjectured similar taxation of appellant in other States. However, the principles announced in the first three cases relied on by the majority[13] would constitute authority for exempting appellant's agents from a tax on the privilege of engaging in the business of selling and delivering apples "in other States to which [appellant's] commerce extends." These principles were there applied by this Court to invalidate taxes on the privilege of negotiating interstate sales, levied by States in which the purchasers resided. In one of the cases (*Caldwell v. North Carolina*, decided in 1903), this Court observed (pp. 632-3) "that efforts to control commerce of this kind, in the interest of the State *where the purchaser resided*, have been frequently made in the form of statutes and municipal ordinances, but . . . such efforts have been heretofore rendered fruitless by the supervising action of this court." (Italics supplied.) The reasoning of these three cases, however, does not support the judgment here which invalidates a privilege tax levied, not by the State where the apples were purchased, but by the State where the apples were grown, where the appellant does business, and to which all proceeds from

[11] See Note 9, *supra*; cf. Sonneborn Bros. v. Cureton, 262 U. S. 506, 516; Pacific C. v. Johnson, 285 U. S. 480, 493.

[12] Rapid Transit Corp. v. New York, 303 U. S. 573, 582.

[13] Robbins v. Shelby County Taxing District, 120 U. S. 489; Caldwell v. North Carolina, 187 U. S. 622; Real Silk Mills v. Portland, 268 U. S. 325.

sales made by appellant are remitted. This is especially true since the three earlier decisions assumed that a privilege tax imposed by an interstate business's State of residence (such as this Washington tax on appellant) would be valid. In *Robbins* v. *Shelby County Taxing District, supra,* at page 498, the Court—in explaining that the levy by the State of purchase of a tax on the privilege of selling would discriminate against out of State businesses—said: "[It is presumable, . . . [that] the merchants and manufacturers of other States in the places where they reside" are taxed for their licensed businesses there. In showing that "the tax . . . [was] discriminative against the merchants and manufacturers of other states" the Court also stated that "[. . .] it not only operates as a restriction upon interstate commerce, but . . . it is intended to have that effect as one of its principal objects." Appellant's business is exempted here from a privilege tax in its State of residence, and approval is given authorities exempting such business from privilege taxes in other States where appellant's activities are carried on. Thus, these three cases stand between appellant and conjectured "multiple taxation" in other States where its agents sell apples. The exemption of interstate business from the type of State taxation here involved is now made complete.

A business engaging in activities in two or more States should bear its part of the tax burdens of each. If valid, non-discriminatory taxes imposed in these States create "multiple" burdens, such "burdens" result from the political subdivisions created by our form of government. They are the price paid for governmental protection and maintenance in all States where the taxpayer does business. A State's taxes are not discriminatory if the State treats those engaged in interstate and intra-state business with equality and justice. If the combined valid and non-discriminatory taxes of many States raise a problem, only Congress has power to consider that problem and to regulate with respect to it. Neither a State, nor a State with the approval of this Court, has the constitutional power to enact rules to adjust and govern conflicting State interests in interstate commerce.

Legislative inquiry might disclose to Congress that the speculative danger of injury to interstate commerce is more than offset by the certain injury to result from depriving States of a practical method of taxation. It might appear to Congress that the adoption of a rule against State taxes measured by interstate commerce

gross receipts would deprive the States of a potent weapon useful in preventing evasion of State taxes.

This Court's rule would permit Washington to tax appellant's net income. But determination and collection of taxes on net incomes are often very difficult because corporate profits and income may be isolated or hidden by accounting methods, holding companies and intercorporate dealings. A substantial portion of the nation's commerce is carried on by corporations with far-flung business activities in many States. Inter-corporate relations may assume "their rather cumbersome and involved nature for the purpose of evading [a State] . . . tax" on income and to "remove income from the state though still creating it within the state."[14] Even "profits themselves are not susceptible of ascertainment with certainty and precision except as a result of inquiries too minute to be practicable."[15]

Congress might conclude that the States should not be prohibited from utilizing non-discriminatory gross receipts taxes for State revenues, because there are "justifications for the gross receipts tax. . . . it has greater certitude and facility of administration than the net income tax, an important consideration to taxpayer and tax gatherer alike. And the volume of transactions indicated on the taxpayer's books may bear a closer relation to the cost of governmental supervision and protection than the annual profit and loss statement."[16]

Only a comprehensive survey and investigation of the entire national economy—which Congress alone has power and facilities to make—can indicate the need for, as well as justify, restricting the taxing power of a State so as to provide against conjectured taxation by more than one State on identical income. A broad and deliberate legislative investigation—which no Court can make—may indicate to Congress that a wise policy for the national economy demands that each State in which an interstate business operates be

[14] Palmolive Co. *v.* Conway, 43 F. (2d) 226, 230, cert. den., 287 U. S. 601; see, Magill "Allocation of Income by Corporate Contract," 44 Harvard Law Review 935; "Interstate Allocation of Corporate Income for Taxing Purposes" (note) XL Yale Law Review 1273; Huston "Allocation of Corporate Net Income for Purposes of Taxation," XXVI Ill. Law Review 725; Breckenridge, "Tax Escape by Manipulations of Holding Company," 9 No. Car. Law Review 189; Perle and Means, "The Modern Corporation and Private Property" (1934), p. 202 *et seq.*

[15] Cardozo, J., dissenting, Stewart Dry Goods Co. *v.* Lewis, 294 U. S. 550, 576.

[16] Rapid Transit Corporation *v.* New York, *supra*, 582-3.

permitted to apply a non-discriminatory tax to the gross receipts of that business either because of its size and volume or partially to offset the tendency toward centralization of the nation's business.[17] Congress may find that to shelter interstate commerce in a tax exempt refuge—in the manner of the judgment here—is to grant that commerce a privileged status over intra-state business, contrary to the national welfare.

It is indicated, however, that Washington might have validly apportioned its fair share of appellant's gross income for taxation. To say that a single State can—subject to supervision and approval by this Court—enact regulations apportioning its share of the taxable income from interstate commerce, is to transfer the constitutional power to regulate such commerce from Congress to the States and Federal courts to which the Constitution gives no such power. The Constitution contemplates that Congress alone shall provide for necessary national uniformity in rules governing foreign and interstate commerce.[18] Rules to further free trade among the States by apportionment or division of taxes on such commerce, are regulations. Both the necessity for such a rule, and the determination and enactment of a regulation to put it into effect, call for facilities and powers possessed neither by a State nor by the courts. A State legislature attempting to put upon interstate business its apportioned share of the burden of taxation is "faced with the impossibility of allocating specifically the profits earned by the processes conducted within" the borders of the State.[19] If an "apportionment" between States of taxes on interstate business is to be made, it cannot be accomplished without national inquiry and national action.

While some formulas for apportionment devised by States have been approved by this Court,[20] others have been invalidated.[21] A

[17] Cf. Brandeis, J., dissenting, *Liggett Co. v. Lee*, 288 U. S. 517, 574: "Businesses may become as harmful to the community by excessive size, as by monopoly or the commonly recognized restraints of trade. If the State should conclude that bigness in retail merchandising as manifested in corporate chain stores menaces the public welfare, it might prohibit the excessive size or extent of that business . . . It was said in *United States v. U. S. Steel Corp.*, 251 U. S. 417, 451, that the Sherman Anti-Trust Act did not forbid large aggregations; but the power of Congress to prohibit corporations of a size deemed excessive from engaging in interstate commerce was not questioned."

[18] Welton *v.* State of Mo., *supra*, 279, 280.

[19] Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113, 121.

[20] Underwood Typewriter Co. *v.* Chamberlain, *supra*; Bass, Etc., Ltd. *v.* Tax Comm., 266 U. S. 271; cf. Nat'l Leather Co. *v.* Mass., 277 U. S. 413.

[21] Hans Rees' Sons *v.* No. Car., 283 U. S. 123; cf. Wallace *v.* Hines, 253 U. S. 66; Alpha Cement Co. *v.* Mass., 268 U. S. 203.

formula applied by Connecticut was held valid,[22] but a similar formula was held invalid when adopted in North Carolina.[23] The litigation which has followed in the wake of State attempts at apportionment has confirmed, in the opinion of many, the wisdom of the Founders in denying to the States and courts, and granting to the Congress, exclusive power over interstate commerce. Departures from this principle have, as here, left intra-state businesses—usually comparatively small—to bear the entire burden of taxes invalidated as to interstate businesses, while interstate businesses—usually conducted on a large scale—have been exempted. Should Washington attempt an apportionment, the fate of its formula would be uncertain until this Court passes upon its fairness. A state's inability to obtain necessary data and information as a basis of a formula for apportionment between itself and the other forty-seven States, indicates in advance that its apportionment might be invalidated. When State statutes of apportionment come here this Court is unable to make the broad national inquiry necessary to reach an informed conclusion on this question of economic policy.

But Congress has both the facilities for acquiring the necessary data, and the constitutional power to act upon it. "The power over commerce . . . . was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it."[24] The "disastrous experiences under the Confederation when the states vied in discriminatory measures against each other"[25] united the Constitutional Convention in the conviction that some branch of the Federal government should have exclusive power to regulate commerce among the States and with foreign nations. Our Constitution adopted by that Convention divided the powers of government between three departments, Congress, the Executive and the Judiciary. It allotted to Congress alone the "Power . . . to regulate Commerce with foreign Nations, and among the several states, . . ." Congress

[22] Underwood case, *supra.*

[23] Rees' case, *supra.*

[24] Gibbons v. Ogden, 9 Wheat. 1, 190.

[25] The Minnesota Rate Cases, 230 U. S. 352, 398. See also, Houston & Texas Ry. v. United States, (The Shreveport Case), 234 U. S. 342, 350. "The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation. . . ." Railroad Co. v. Richmond, 19 Wall. 584, 589. See also, County of Mobile v. Kimball, 102 U. S. 691, 697.

is the only department of our government — State or Federal — vested with authority to determine whether "multiple taxation" is injurious to the national economy; whether national regulations for division of tax measured by interstate commerce gross receipts should or should not be adopted; and what regulations, if any, should protect interstate commerce from "multiple taxation." It "is the function of this Court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power."[26]

Until 1936,[27] this Court had never stricken down — as violating the Commerce Clause — a uniform and non-discriminatory State privilege tax measured by gross receipts, and constituting an integral element of a comprehensive State tax program. In *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, decided half a century ago and relied upon to support the judgment here, this Court did not determine that such a general business tax—applied to all businesses within a State—could not be measured by interstate commerce gross receipts. On the contrary, the Court pointed out that the invalidated tax was "a tax on transportation only" (p. 345), and that even one engaged in transportation could "like any other citizen, ... be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment." That, as the Court made clear, was "an entirely different thing from laying a special tax upon his receipts in a particular employment." (p. 342) Since the *Philadelphia Steamship Co.* case, this Court has sustained many State taxes measured by receipts both from interstate and intra-state commerce.[28] It was not until the decisions in the cases of *Crew Levick Co.* v. *Pa.*, 245 U. S. 292, 296, and *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 329, decided 1917 and 1918, respectively, that this Court first

[26] The Minnesota Rate Cases, *supra*, 433.

[27] Fisher's Blend Station *v.* Tax Com'n., 297 U. S. 650, see Adams Manufacturing Co. *v.* Storen, 304 U. S. 307.

[28] See notes 17, 18 and 19, dissent, Adams Manufacturing Co. *v.* Storen, *supra*, p. 329.

tentatively announced, by way of dicta, a rule condemning State taxes based on gross receipts from interstate commerce. The full-blown rule under which the Federal courts strike down generally applied non-discriminatory State taxes measured by gross receipts from interstate commerce ripened into its present expanded form only eight months ago (*Adams Manufacturing Co.* v. *Storen*, May 16, 1938). This recent judicial restriction—still less than a year old—on the power of the States to levy general gross receipts taxes, cannot be justified or validated by claiming prestige from advanced age.

Since the Constitution grants sole and exclusive power to Congress to regulate commerce among the States, repeated assumption of this power by the courts—even over a long period of years—could not make this assumption of power constitutional. April 25, 1938, this Court overruled and renounced an unconstitutional assumption of power by the Federal courts based on a doctrine extending back through an unbroken line of authority to 1842.[29] In overruling, it was said: "We merely declare that in applying the doctrine [declared unconstitutional] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." (at page 80.) A century old rule had produced "injustice and confusion" and "the unconstitutionality of the course pursued . . . [had become] clear . . . ." (pp. 77, 78.) That decision rested upon the sound principle that the rule of stare decisis cannot confer powers upon the courts which the inexorable command of the Constitution says they shall not have. State obedience to an unconstitutional assumption of power by the judicial branch of government, and inaction by the Congress, cannot amend the Constitution by creating and establishing a new "feature of our constitutional system." No provision of the Constitution authorizes its amendment in this manner.

It is as essential today, as at the time of the adoption of the Constitution, that commerce among the States and with foreign nations be left free from discriminatory and retaliatory burdens imposed by the States. It is of equal importance, however, that the judicial department of our government scrupulously observe its constitutional limitations and that Congress alone should adopt a broad national policy of regulation—if otherwise valid State laws combine to

[29] Erie R. Co. v. Tompkins, 304 U. S. 64.

hamper the free flow of commerce. Doubtless, much confusion would be avoided if the courts would refrain from restricting the enforcement of valid, non-discriminatory State tax laws. Any belief that Congress has failed to take cognizance of the problems of conjectured "multiple taxation" or "apportionment" by exerting its exclusive power over interstate commerce, is an inadequate reason for the judicial branch of government—without constitutional power—to attempt to perform the duty constitutionally reposed in Congress. I would return to the rule that—except for State acts designed to impose discriminatory burdens on interstate commerce because it *is* interstate—Congress alone must "determine how far [interstate commerce] . . . shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited."[30]

For these and other reasons set out elsewhere[31] I believe the judgment of the Supreme Court of Washington should be affirmed.

[30] Welton *v.* State of Mo., *supra*, 280.

[31] See dissent, Adams Mfg. Co. *v.* Storen, 304 U. S. 307, 316.